A

TREATISE

ON THE

LAW OF MORTGAGE.

BY

RICHARD HOLMES COOTE, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

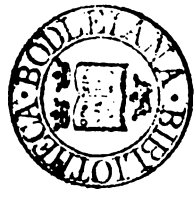
SECOND EDITION.

LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,

43, FLEET STREET.

1837.



LONDON:
PRINTED BY C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

TO

LEWIS DUVAL, ESQ.

My dear Sir,

My labours in preparing this Edition for the press are at length brought to a close, and the pleasing task alone remains of addressing it to you.

I have long been desirous of thus publicly expressing my admiration of your talents, and the high regard which I entertain and feel for your continued friendship.

Your extensive learning and profound knowledge of the Law of Real Property, must have long since led you to the dignities of the Profession, had such been in the course of your career.

As it is, you must rest satisfied with being at the head of that branch of the Law which has been the peculiar subject of your Practice.

Trusting that lengthened life and health will be granted you, no less for the gratification of your Friends than for the advantage of the Public,

I remain,

My dear Sir,

Yours very truly,

RICHARD HOLMES COOTE.

1, Stone Buildings, Lincoln's Inn,
May, 1837.

PREFACE.

During the period which has elapsed since the publication of the former edition of this Treatise, so many important alterations have been made by the legislature in the Law of Real Property, that the labour of adapting the work to the present state of the law has been almost equal to that of its original production.

The Author cannot flatter himself that omissions and errors will not be discovered, but he can safely allege, that neither care nor time (so far as his other engagements permitted) has been spared in order to avoid them.

In some instances it has been impossible to predicate, with certainty, the full effect of the new Statute Law on the law as founded on the

decisions of the Courts, or, in other words, the effect of the *lex scripta* on the *lex non scripta*. An instance of this occurs under the statute of the 1 Will. IV. cap. 47, prohibiting the parol from demurring by reason of infancy, which raises the question whether that enactment will apply to the case of a decree of foreclosure against an infant mortgagor; and many similar doubts might be instanced which can only be set at rest by the decisions of Courts of competent jurisdiction.

An explanation may be due from the Author for the apparent contradictions in the passages to be found in pages 46, 48, 127, 435, 436, and 691. But the cause was this:—His Honor the Vice Chancellor, in the cases of Ex parte Goddard and Ex parte Stanley, had made decisions which, if the statute 1 Will. IV. c. 60, s. 8, on which they were founded, had stood alone, would clearly have been according to law.

It happened, however, that a subsequent statute (4 & 5 Will. IV. c. 23), mistakingly referred to the former statute, as containing a

provision which literally it did not contain, and it occurred to the Author, who so stated it, that such a reference by the legislature might possibly be sufficient by implication to give effect to that extent to the provisions in the former act.

The precise point was afterwards raised before the Master of the Rolls in Ex parte Whitton, and his Lordship's decision was in accordance with the view so taken and stated in the work by the Author. The Vice Chancellor subsequently, on consideration of both statutes, agreed with the Master of the Rolls, and made an order to that effect on a rehearing of the case Ex parte Stanley, as noticed in page 691.

An important decision came to the Author's knowledge, after the work had in part proceeded through the press, viz.:—the case of Peacock *v.* Burt, which will be found in the Appendix, and was decided by the present Lord Chancellor, in that clear and distinct manner which characterizes his Lordship's judgments.

This decision set at rest a doubt raised by Lord Eldon, as stated in page 286. The effect of the case is stated in pages 454 and 456, and the case itself at page 693.

The Author, in the former edition, ventured to differ with Sir Edward Sugden on a point of great nicety in respect of the doctrine of marshalling assets in cases relating to the vendor's lien on the land for the purchase money, and he had the satisfaction to find the ultimate decision was in favour of his view of the law, so far at least as regarded creditors, page 310.

The author also formerly suggested, that since the passing of the 57 Geo. III. cap. 99, charges on church livings were no longer legal. Various decisions have since taken place in affirmance of that doctrine, which will be found noticed in their proper place in this edition.

The Court of King's Bench has decided, in opposition to the opinion formerly expressed by the author, that the lessee of a mortgagor

under a lease granted subsequent to the mortgage is liable, on eviction by the mortgagee, to an action for mesne profits. The Author had stated his opinion to be, that he was not so liable, on the ground that the lessee might be considered as in some measure coming in by title; but, in the case of Pope *v.* Biggs, the opinion of the judges of the Court of King's Bench was to the contrary, page 408.

Another important point has been decided since the former edition on a question first raised by Sir Edward Sugden, in his Treatise on Vendors and Purchasers, viz.:—whether a judgment, although with notice, would affect a purchaser in case execution was not sued out, prior to the purchaser obtaining a conveyance from the trustee in whom the legal estate was vested. It has been decided that it will, page 77.

It is now settled that an appointee will not be affected at law by a judgment against the appointor, on the ground that he comes in above the appointor and under the deed cre-

ating the power. The Author entertained an opinion that this would not apply in *Equity*, in case the purchaser *had notice* of the judgment. The Vice Chancellor, in Eaton *v.* Sanxter, decided that the doctrine was applicable in both cases, page 78.

The Author has added Chapters on the Statutes of Fraudulent Devises, Tolls and Stamps, which he hopes will be found useful.

With these preliminary observations, he submits this edition of his work to the Profession, trusting to its lenient judgment on its faults and imperfections.

The Author takes the opportunity of acknowledging his obligations to Mr. Walters of Newcastle, Mr. Manning, and Mr. Charles Beavan, for their kind communications.

1, Stone Buildings,
May, 1837.

PREFACE

TO THE FIRST EDITION.

In bringing the present Treatise to a close, the Author is naturally anxious to address a few words in its behalf to the Public. He was induced to the undertaking by the general impression that a modern Work on the Law of Mortgage was wanting, and from his not being aware that any other gentleman was disposed to the task. Its appearance in Parts was a subject of regret to the Author, but circumstances, over which he had no control, rendered it unavoidable. Since the publication of the First Part, another Treatise on the same Subject has been published, as also a new edition of Mr. Powell's Treatise on Mortgages, with Notes. Had the Author been aware that any other Work on the same subject was in progress, he would readily have relinquished his engagement; but he was not acquainted with the fact, until it was too late for him to recede.

In reference to his own performance, he trusts he has been cautious in not drawing conclusions unwarranted by the authorities; he has been anxiously desirous, to the best of his abilities, in no instance to mislead his Readers.

The compilation of a Law Treatise has, from the number of our Reports, become a work of considerable labour; and in traversing so wide a field of inquiry as is presented on a review of the Law on Mortgage, errors will unavoidably arise, and many defects occur; but the Author has the satisfaction of knowing that those, who from their learning and talents are best enabled to form a judgment of his Work, will be the most inclined duly to appreciate its difficulties, and to make every candid allowance for its imperfections.

In conclusion, the Author hopes his efforts may, in some degree, prove useful to the Profession, and that he has not fruitlessly expended so much time and labour as have been devoted to the accomplishment of the present Work.

LINCOLN'S INN,
Michaelmas Term, 1822.

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ERRATA AND ADDENDA.

Page 46, note *m*. *add* "*sed vide contra, Ex parte* Whitton, 1 Keen, 279.
—— 48, line 5 from the bottom, *add*, "*Sed vide Ex parte* Whitton, *supra*."
—— 78, note *f*, *add* "*et vide* 6 Simons, 517."
—— 127, note *l*, *add*, "*Sed vide contra, Ex parte* Whitton, *supra*."
—— 128, line 2, *instead of* "In a Bill now before Parliament it is intended," *lege* "In a Bill late before Parliament it was proposed."
—— 286, note *k*, *add* "*Sed vide contra*, Peacock *v.* Burt, Appendix, *et vide* pages 455, 456."
—— 340, line 12, *for* "Dixon *v.* Evans" *lege* "Dixon *v.* Ewart."
—— 387, last line, *dele* "in the next session."
—— 416, line 21, *add* "and so decided in Rogers *v.* Humphrys, 4 Barn. & Ellis, 299."
—— 278, note *m*, *add* "confirmed, 1 Mylne & Craig, 547."
—— 456, note *b*, *for* "Joulmin *v.* Steere," *lege* "Toulmin *v.* Steere."
—— 524, note *l*, *for* "Rufford *v.* Biggs," *lege* "Rufford *v.* Bishop."

A

TREATISE

ON

THE LAW OF MORTGAGE.

BOOK THE FIRST.

INTRODUCTORY CHAPTER.

A MORTGAGE may be defined to be (*a*) *a debt by specialty*, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches. It is a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the civil law. An inquiry into its nature and practice will lead to the consideration of the origin and historical deduction of mortgages; their adoption by the common law, and the establishment of the equitable right of redemption. We shall be then led to inquire into

(*a*) 2 Atk. 435. *Sed vide infra*, Book V. Chap. iii. if the mortgagee have neither covenant nor bond.

the nature of an equity of redemption, its incidents and qualities, the division of the respective interests of the mortgagee and mortgagor in the land in pledge, into legal and equitable estates, and the ultimate establishment in equity of an actual ownership in the mortgagor, susceptible of the like limitations and modifications of interest as the land itself. It will then be expedient to take into consideration certain compulsory modes, by which land may become a security for debt by statutory enactments, and afterwards inquire into the different subjects and modes of mortgage. Our inquiry will subsequently lead to a consideration of the rights of parties entitled to the equity of redemption, the priority of incumbrances, of tacking, and the doctrine of notice as applied to mortgages; and in conclusion by what estate the mortgage debt must be discharged, of foreclosure, and of the several cases and authorities relating to devises of mortgaged lands, whether by the mortgagor or mortgagee.

Preceding writers have traced high the origin of mortgages. Pledges or pawns were probably known to the earliest nations(*b*). As soon as men recognize the rights of property, their necessities will suggest the idea of pledging that property, as the ready means of supplying their wants without departing with their absolute ownership. Their immediate personal property(*c*) may be the first objects of

(*b*) Mr. Ellis observes in his Journal of the late Embassy to China, page 157, that pawnbrokers' shops are as numerous in Chinese cities as in London.

(*c*) Deuteronomy, chap. 24.

pledge; afterwards articles of merchandize and barter; and ultimately land.

Mortgages of a peculiar nature are said to have been known amongst the Jews, from whom, according to the opinions of some writers, the notion of mortgaging lands had origin. Land could not, according to the Jewish law, be aliened beyond the next jubilee, which occurred every fifty years. The original owner might, at any time during the fifty years, redeem on payment of the value of the land, to be computed from the time of redemption to the next jubilee, and, at all events, when the day of jubilee arrived, the lands returned to the owner, discharged of the debt, and their loans were regulated accordingly.

From the Jews, the idea of mortgages is supposed to have passed to the Greeks and Romans. Pledges and pawns were well known to the Roman law. The Roman hypotheca closely corresponds with our idea of a mortgage. The subject in pledge was retained by the debtor, and the creditor was, in default of payment, driven to his actio hypothecaria to obtain possession, and at any time before sentence the debtor might redeem (*d*). By that law, the debt was the principal, the security an incident, and when the one ceased, the other ceased also, and until sentence, the ownership of the debtor was not displaced.

Doubts are entertained whether mortgages were

(*d*) Bac. Ab. vol. v. 2.

known to the Anglo-Saxons. We are in a great degree ignorant of the nature of their law of landed property. The most profound writers are at variance(*e*); the one side asserting the law of feuds or tenures to have been acknowledged; the other that it was not. But it seems to be admitted that a right of free alienation of property existed, which implies the right of mortgage or conditional sale; and whether the feudal law was recognized or not, it is manifest that it was not admitted with the burthensome restrictions afterwards introduced by the Norman feudists(*f*), and which we may conclude to have been those generally submitted to by the Normans themselves, and other continental nations then acknowledging the feudal law. It is not highly improbable, that the Saxons might on their conquest have found traces of the civil law introduced by the Romans, during the long period of their possession, and have engrafted them on the principles of the feudal law as then acknowledged by themselves, and which had not then arrived at the full maturity it subsequently attained.

After the Norman conquest, mortgages must, it should seem, have been for a time suspended. In the 20th year of William's reign, and on the completion of Domesday-book, he summoned a meeting of all the principal landholders in London and Salisbury, and accepted from them a surrender of their lands, and regranted them on performance of homage and

(*e*) Wright's Tenures, 47.

(*f*) Somn. Treat. Gavel. 87; Spel. Treat. of Feuds, 21.

the oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, and it was held the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seignory without his tenant's consent, although the tenants (even of the crown it should seem) might grant subinfeudations (*i. e.* to hold of themselves) without licence. It was further held, the tenant could not subject his lands to his debts by execution of law, for if he could, he might have effected that circuitously, which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he alien them without the consent of the next collateral heir(*g*). By these restraints on alienation, mortgages of land must have been nearly extinguished(*h*).

A further considerable obstacle to mortgages arose and long continued from the prejudice of the times; for in analogy to the Jewish law(*i*), which forbade profit to be made on the loan of money from Jew to Jew, but not so on a loan from a Jew to a stranger, it was held to be usury for Christians to lend money at interest(*k*), and (in case on inquest after death it was found that a man had died an usurer) the offence

(*g*) Wright's Tenures, 168.

(*h*) "Feudalia, invito domino, aut agnatis, non rectè subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est." Corvin. 268.

(*i*) Deut. chap. 23.

(*k*) 3 Inst. 88; Glanville, lib. 7, cap. 16.

was punishable by forfeiture of his lands, goods, and chattels (*l*). The consequence was, that the Jews became the great money-lenders of Europe; and in compliance with the subsisting prejudice, the common law of England held, that if lands were enfeoffed to the creditor, and the rents and profits were *ad interim* received by him, and not applied in reduction of the principal of his debt, it was a species of usury which, although not prohibited by the king's court, was punishable by the forfeiture of the lands and chattels of the creditor, if he died possessed of the pledge. And this, according to Glanville (*m*), was the original meaning of the term *mortuum vadium*, or mortgage, and not the meaning subsequently attached to the word by Littleton and others, as hereafter explained.

The improving spirit of the age struggled hard against the fetters on alienation, and at length the statute of *Quia Emptores Terrarum* (*n*), passed in the reign of a monarch deservedly stiled the English Justinian, gave a general licence of free alienation to all, except the immediate tenants of the crown, at the same time that it abolished the power of subinfeudation; thus at once simplifying the tenure, and giving freedom to the alienation of the land of the realm.

(*l*) When our old writers speak of an usurer, we must understand one who lent money at interest. It was not until the 37 of Hen. 8, cap. 9, that loans at interest were declared legal, if not exceeding 10*l. per cent.*

(*m*) Glanville, De Leg. lib. 10, cap. 6, cap. 8.

(*n*) 18 Edw. 1.

On the removal of the restrictions, which impeded the circulation of landed property, mortgages became general. Of these we shall treat in the following chapters.

Fines on alienation by tenants *in capite* were not abolished until the 12 Car. 2, cap. 24, put an end to the remaining feudal burthens.

CHAPTER II.

OF MORTGAGES AT COMMON LAW.

THE common law recognized two kinds of landed security, viz. *vivum vadium* and *mortuum vadium*. The *vivum vadium* and also the *mortuum vadium* (according to Glanville), as at first known, were determinable or base fees, with a right of reverter in the feoffor and his heirs, on the payment of a given sum. The *mortuum vadium*, or mortgage ultimately known at the common law, was an absolute fee, with a condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between the estates was striking. In the first instances, the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter instance the feoffee took the whole estate, subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case the defeasibility was an inherent quality of the estate; in the other case the determination was collateral to the estate.

The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt; the creditor took actual possession of the estate, and received the rents, and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor

might, as before observed, re-enter and maintain ejectment; and it is said to have been called *vivum vadium*, because neither debt nor estate was lost.

This mode of security was probably never general: it is ill adapted to the purpose of a pledge, whose object is the repayment of the loan in one entire sum at a given time, and not a repayment by small instalments, which in fact is eating out the debt piecemeal; and it seems now to have entirely ceased. A security in land, bearing a remote resemblance to the *vivum vadium*, may be considered as subsisting under the appellation of Welch mortgage; but there is this distinction between the securities, viz. that in the *vivum vadium*, the rents were applied in satisfaction of the principal, and in Welch mortgages they are received in satisfaction of the interest, while the principal remains undiminished. In one respect they agree,—the estate is never forfeited. The Welch mortgage seems in fact pretty closely to resemble the ancient *mortuum vadium*.

The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville, as has been observed (*a*), gives a different meaning to the origin of the term. He says, "Mor-

(*a*) Lib. 10, cap. 6.

tuum vadium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquietant;" and applies it to the before-mentioned species of usury at common law, viz. a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the mean time; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, and while yet the fetters on alienation were unremoved. We may therefore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained undiminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz. that the estate was never lost.

There is no trace of the period when this mode of mortgage fell into disuse. In its stead arose the *mortuum vadium*, or mortgage, afterwards so well known at common law, and thus described by Littleton (*b*). "Item; if a feoffment be made upon such

(*b*) Sec. 332.

condition, that if the feoffor pay to the feoffee at a certain day, &c. forty pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay the money, then the pledge is dead as to the tenant, &c."

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse, and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment or in a deed of defeazance executed *at the same time* (for the common law does not allow a feoffment to be defeazanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition (*c*).

(*c*) In Bacon's Abridgment, vol. v. p. 15, it is stated that "the mortgagor before forfeiture, and whilst it remains uncertain whether

If the condition was performed, the feoffor re-entered and was in of his old estate, paramount all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post*, or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium*. And in order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring, that until breach of condition, the mortgagor might hold the estate; and on the other hand, the mortgagor engaged, that in such event, he would do all lawful acts for further assurance.

Although the common law did not favour conditions, but required strict performance of them (*d*), yet it was in certain cases satisfied with the performance of the intent of the condition (*e*), though not performed in words; and although a difference

---

he will perform the condition at the time limited or not, hath the legal estate in him." This is a mistake; the legal estate instantly vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor.

(*d*) Co. Litt. 205, a. (*e*) Shep. Touch. 139.

was taken(*f*) between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates.

The general rules at common law regulating the performance of conditions in mortgage, were as follow:—

If time and place were appointed for payment of the money, tender must be made accordingly; but if no place were appointed, then (the money being a sum in gross, and collateral to the title to the land) the mortgagor was bound to seek the mortgagee and tender him the money personally, if within the realm, and it was not sufficient to tender it on the land(*g*).

If no time were appointed, the mortgagor had his whole life for payment of it(*h*).

If no time were appointed, and the condition were, if the mortgagor (without mentioning heirs, &c.) pay 10*l.* to the mortgagee, and the mortgagor died without paying it, the condition was broken and the

(*f*) Co. Litt. 206, a.
(*g*) Ibid. 210, b. (*h*) Ibid. 208, b.

estate absolute(*i*). But if a time had been appointed, and the condition had been that the mortgagor (without more) should pay to the mortgagee 10*l*., and the mortgagor died before the day(*k*), then his heir, executor, or administrator, or the guardian of the heir, might tender the money at the time, and save the condition.

If the words of the condition were for payment unto the feoffee or his heirs(*l*), the money could not be paid to the executor or the assign; if "to heirs or assigns," and the mortgagee transferred the mortgage to another, it might be paid to the first or second feoffee(*m*); or if the first feoffee was dead, to his heirs, but not to his executors(*n*), for the law will never seek an assign in law, where there is one in fact(*o*); if "to heirs, executors, or assigns," it might be paid to either(*p*).

If the condition was for payment by the mortgagor *and* I. S.(*q*), payment by I. S. alone, after the death of the mortgagor, was good; but not during his life.

The mortgagor might tender the money on the appointed day, at any convenient time in which the money might be counted before sun-set(*r*). And he might pay it tied up in bags, and it was at the peril

(*i*) Litt. sec. 337.
(*k*) Ibid. 334.
(*l*) 5 Co. 96; Co. Litt. 210.
(*m*) Ibid.
(*n*) 5 Co. 97; Dyer, 180.
(*o*) Co. Litt. 210.
(*p*) Ibid.
(*q*) Shep. Touch. 141.
(*r*) Wade's case, 5 Co. 115.

of the mortgagee to miscount it(*s*). And even if part of the money were counterfeit coin, and the mortgagee accepted it, it was a good performance(*t*).

A doubt was formerly entertained whether a tender in Bank of England notes (although a good ground for equitable relief) was a tender at law to save the condition, because although the legislature had enacted that on tender of bank-notes in satisfaction of a debt and refusal by the creditor, the debtor should not be held to special bail(*u*); yet the creditor might have proceeded against him by action at law. And although the debtor might on action brought pay the money into Court, and thus stop the course of the action(*x*); yet he was liable to costs up to that time: and it therefore seemed that a tender in bank-notes (if objected to by the creditor(*y*)) was not such a tender as would save the condition(*z*).

A recent statute(*a*) has removed this doubt; by which it is enacted, that after the 1st of August, 1834, unless and until parliament shall otherwise direct, a tender of a note of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note, and shall be taken to be valid as a tender to such amount, for all sums above *5l.*, on all occasions on which any tender of

(*s*) Wade's case, 5 Co. 115. (*u*) 37 Geo. III. c. 91, s. 8.
(*t*) Ibid. (*x*) 52 Geo. III. c. 50.
(*y*) Wright *v.* Reed, 3 Term Rep. 554; and *vide* 2 Scho. & Lef. 534.
(*z*) Shep. Touch. 136. (*a*) 3 & 4 W. IV. c. 98, s. 6.

money may be legally made, so long as the Bank of England shall continue to pay on demand their notes in legal coin; but it is provided that no such notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the company. But the governor and company are not to be liable or be required to pay and satisfy, at any of their branch banks, notes of the company not made specially payable at such branch bank, although they are liable to pay and satisfy at the Bank of England in London, all notes of the company or any branch bank.

It was also held, that if an account were stated between the parties, and the balance paid(*b*), or if a new security were taken by bond or statute(*c*), it was a good performance. "And so in most cases, where by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way, this is a good performance of the condition, *volenti non fit injuria*(*d*)."

The law was stricter when the condition was to be performed to a stranger, or to affect the rights of third persons(*e*). Thus it was adjudged(*f*), that if the mortgagee before transfer or assignment received the money, and returned the whole or part to the mortgagor, it was a good performance of the con-

(*b*) Co. Litt. 213. (*c*) Ibid. 212.
(*d*) Shep. Touch. 143.
(*e*) 5 Co. 96; Cro. Eliz. 383; Moor, 708; Co. Litt. 209, b.
(*f*) Powell *v.* Bartholomew, Mich. 40, 41 Eliz. B. R.

dition; but where the condition was for payment to the feoffee, his heirs, or assigns(*g*), and the feoffee transferred the mortgage and died, and the mortgagor paid the money to the heir of the first mortgagee who returned part, this was held no good performance to divest the lands from the alienee, or to injure the rights of third persons.

If, at the appointed day, legal tender of the money was made and refused, or no person was ready to receive it, the condition was satisfied, and the mortgagor or his heirs might re-enter(*h*). But here a distinction was taken between a sum by way of gift secured on land, and a debt(*i*). The former was in such case absolutely lost, but the latter was considered as still subsisting as a personal duty, and might be recovered by action at law.

It must be further remarked, this right of re-entry on performance of the condition, was neither alienable nor devisable, and could be reserved only, as before-mentioned, to the feoffor or his heirs.

Thus mortgages stood at common law, incumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor; and it is difficult to conceive, had the Courts of Law been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The for-

(*g*) Goodall's case, 5 Co. 96.

(*h*) Dyer, 181; Co. Litt. 209.

(*i*) 5 Bac. Ab. 21; Co. Litt. 209, b.

feiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property(*k*).

Happily a jurisdiction was arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor.

It may under this head be lastly remarked, that at the present day, if the condition, instead of determining the estate of the mortgagee, be that on payment, &c. the feoffee, &c. shall reconvey or reassign the estate, there, notwithstanding the performance of the condition by payment within the appointed time, an actual reconveyance or reassignment will be necessary.

(*k*) Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it. Thus in Beaumont and Fletcher:

ALATHE.—Thou hast undone a faithful gentleman,
By taking forfeit of his land.

ALGRIPE.—I do confess. I will henceforth practise repentance.
I will restore *all mortgages*, forswear abominable usury.

The Night Walker, or Little Thief.

CHAPTER III.

OF MORTGAGE, WITH EQUITY OF REDEMPTION.

It has been already said, that by the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. It has been seen how decidedly opposed to this is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of equity, a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our Courts of Equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the common law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit, what was intended as a mere pledge; and they adjudged that the breach of the con-

dition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law.

Against the introduction of this novelty, the judges of common law strenuously opposed themselves; and though ultimately defeated by the increasing power of equity, they nevertheless in their own courts still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity. There is no record of the time when this equity was first granted. In the before-mentioned cases of Wade (*a*) and Goodall (*b*), which were decided towards the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the 37th year of Elizabeth's reign (*c*), in which the equity was decreed; and it must soon after this time have been generally in practice, for there is a case decided in the first year of Charles the First (*d*), in which the doctrine seems fully admitted. It was a question as to a mortgage term which had been forfeited by non-payment according to the condition; and the Court held, that although the money was not paid at the day, but afterwards, yet the term ought to be void *in equity*, as well as

(*a*) 5 Co. 115. (*b*) Ibid. 96.

(*c*) Langford *v.* Barnard, Tothill, 134.

(*d*) Emanuel College *v.* Evans, 1 Rep. in Chancery, 10.

on a legal payment it would have been void at law. In the intermediate reign of King James the First, the Courts of Equity became established in power, and the same period may be reasonably assigned as that in which the doctrine of equity of redemption was fully recognised.

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably, the rule of law, *modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the Courts of Equity, to prevent this equitable jurisdiction being nullified by the artifice of the parties.

But those Courts, looking always at the intent, and not at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as plain and undeviating rules(*e*), that it was inequitable the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs; and they established as principles not to

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(*e*) Newcomb *v.* Bonham, 2 Vent. 364; 1 Vern. 7, 214, 233; Howard *v.* Harris, 1 Vern. 192; Jason *v.* Eyre, 2 Ch. Ca. 33.

be departed from, that once a mortgage always a mortgage; that an estate could not at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that a mortgage could no more be irredeemable than a distress irrepleviable; that the law will control even an express agreement of the parties, and, by the same reason, equity will let a man loose from his agreement, and even against his agreement, admit him to redeem a mortgage (*f*); and that whatever clause or covenant there may be in a conveyance, yet if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, a Court of Equity will always construe it so (*g*).

Acting on these principles, they decided that no condition could be valid restricting the right of redemption within a given or limited time, as in Kelvington *v.* Gardiner (*h*), where the right of redemption was attempted to be confined to the lifetime of the mortgagor; and in Newcomb *v.* Bonham (*i*), where the like attempt was made. And although the decree for redemption made by Lord Chancellor Nottingham in the last-mentioned case was ultimately

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(*f*) 1 Vern. 192, *et vide* East India Company *v.* Atkyns, Comyns, 349, where *arguendo* it is said, equity will relieve, even if the mortgagor take his oath not to redeem.

(*g*) 5 Bac. Ab. 5.

(*h*) Kelvington *v.* Gardiner, cited 1 Vern. 192, *et vide* Spurgeon *v.* Collier, 1 Eden's Rep. 55.

(*i*) Newcomb *v.* Bonham, 1 Vern. 7, *et vide* Jason *v.* Eyre, *supra*; Price *v.* Perrie, 2 Freem. 258.

reversed by Lord Keeper North, yet that was done on a principle which will be hereafter explained, and does not at all militate against the general principle above stated.

Nor did the attempt better succeed to confine the right of redemption to a particular line or class of heirs: for where a man having mortgaged his lands (*k*), amongst which were estates, which after marriage had been limited by way of additional jointure to his wife, and the proviso was, if the mortgagor, *or the heirs male of his body*, should pay, &c. then he or they might re-enter; and he covenanted that no one but himself, or the heirs male of his body, should be admitted to redeem; the jointress, after the death of her husband, without issue, filed her bill to redeem, and it was decreed, notwithstanding an attempt made by the mortgagee to support the agreement, on the pretence that he had purchased the estate from the father of the mortgagor, who was tenant for life only, and had afterwards been evicted by the mortgagor as tenant in tail male, and that the intention was, if the mortgagor had no issue male, to make the mortgagee some compensation for his loss; but of which understanding between the parties no proof was adduced.

The report of the above case states, that the Lord Keeper in decreeing redemption, added, he did so the rather, because the defendant had *a covenant* for the repayment of his money, and therefore it was in

(*k*) Howard *v.* Harris, 2 Chan. Ca. 147.

the power of the mortgagee to have made it a mortgage at any time, which would bring it within another rule hereafter mentioned, viz. that a mortgage cannot be a mortgage on one side only, but must be mutual. It is however clear, that the omission either of a bond or covenant, which are collateral securities, creating a personal obligation on the mortgagor, will make no difference in the right to redeem, for (*l*) every loan implies a debt; and the right to redeem proceeds on the principle before stated, viz. that a creditor shall not obtain an advantage by his security, beyond his principal, interest, and costs. The bond or covenant may tend to explain a transaction, and show the intention of the parties in a doubtful case to create a mortgage; it may be good matter of evidence; but neither of them is a necessary ingredient in the creation of mortgage; for, to apply the remedy, equity only requires to be satisfied that the conveyance was originally intended as a security for the payment of a sum of money, whatever form the security may take.

Accordingly equity will admit even *parol* evidence to shew the conveyance was intended by way of security only. A case decided by Lord Chancellor Nottingham is one of frequent reference (*m*). A man agreed to lend money on mortgage, and it was proposed, as was formerly practised, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of de-

(*l*) 1 Pr. Wms. 271; 2 Atk. 496.

(*m*) Sir G. Maxwell *v.* Lady Montacute, Pre. Cha. 526.

feazance from the mortgagee. The mortgagor executed the conveyance, and then the mortgagee refused to execute the defeazance. Lord Nottingham (after the statute of frauds) admitted parol evidence to shew the agreement, and decreed against the mortgagee.

So Lord Hardwicke says(*n*), "Suppose a person who advances money should, after he (the mortgagor) has executed the absolute conveyance, refuse to execute the defeazance, will not this Court relieve against the fraud?" Again, in another case(*o*), he expressly recognizes the same doctrine, and in the subsequent case of Joynes *v.* Statham (*p*), the Lord Chancellor observed, "Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omit to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty in this Court, upon reading evidence, to shew the omission?" So where(*q*) an absolute conveyance is made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and if the conveyance be absolute, and a bill be filed to redeem, and the de-

(*n*) Walker *v.* Walker, 2 Atk. 99; Dixon *v.* Parker, 2 Ves. 225.

(*o*) Young *v.* Peachey, 2 Atk. 257.

(*p*) Joynes *v.* Statham, 3 Atk. 387.

(*q*) Maxwell *v.* Montacute, *supra*.

fendant swear it was an absolute purchase; nevertheless parol evidence will, it seems, be admissible to shew the contrary (*r*). And an indorsement on the deed of conveyance, signed by the mortgagor only, is evidence to shew the intent (*s*); as is also a note in writing signed by the parties (*t*); and in an instance where an absolute conveyance for 80*l.* was made, and on bill filed to redeem, the defendant by his answer insisted, that it was intended to be an absolute conveyance without proviso and condition for redemption, but admitted it was in trust after payment of the 80*l.* and interest, for the plaintiff's wife and children, but no such trust was declared by writing. The plaintiff insisted, that as the defendant had confessed he was not to have the estate absolutely, and had not proved the trust, he, the plaintiff, was entitled to redeem. The Court, however, decreed the trust for the benefit of the plaintiff's wife and children (*u*).

Nor will the Courts permit the mortgagee to clog the equity of redemption with any bye-agreement (*x*), so as to gain an undue advantage. Thus in a case, in which money was lent on mortgage at 6 per cent. and by a separate deed, the mortgagor covenanted to convey to the mortgagee, if he (the mortgagee) thought fit, ground-rents at twenty years' purchase, to the value of 16,000*l.* On bill filed to redeem,

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(*r*) Franklyn *v.* Fern, Barnard. 30. (*s*) Ibid.
(*t*) Clench *v.* Witherby, Finch's Rep. 376.
(*u*) Hampton *v.* Spencer, 2 Vern. 288.
(*x*) Jennings *v.* Ward and others, 2 Vern. 520.

on the usual terms of payment of principal, interest, and costs, the defendant insisted on the agreement; but the Master of the Rolls decreed according to the prayer of the bill.

And so careful is equity to protect the debtor against the oppression of his creditor, that it will not allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan*, for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage-money at the appointed time, justly considering it would throw open a wide door to oppression, and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specific time (*y*).

But we must be careful to distinguish between the last-mentioned rule, and a case with which it may be confounded, viz. an agreement by the mortgagor, in case of sale, to give the mortgagee a preference of pre-emption, which if claimed within a reasonable time will be enforced (*z*). And although at first view this may seem to be within the objection raised by equity, viz. that of giving the creditor a collateral advantage over and above his principal and interest, yet on closer inspection it will be found clear of the rule. The option of sale is still left with the mort-

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(*y*) Price *v.* Perrie, 2 Freem. 258. Willett *v.* Winnell, 1 Vern. 488; Bowen *v.* Edwards, 1 Rep. in Chan. 222.

(*z*) Orby *v.* Trigg, 2 Eq. Ca. Ab. 599, 24; 9 Mod. 2.

gagor; he may redeem or sell, nor is he tied down to price; all that is stipulated for is, that if he thinks fit to sell, he shall give the mortgagee the refusal. In Willett *v.* Winnell, and Bowen *v.* Edwards, the sale was compulsory, and the price stipulated.

The rule must be further distinguished from the cases, in which the Courts have considered the agreement not to amount to a mortgage, but to be a *conditional purchase*, and in which instances the vendor will, it seems, be kept to his contract. Of this class is the case of an agreement for the purchase of the equity of redemption entered into *bonâ fide* and subsequently to a mortgage which was made and concluded without reference to any such agreement, followed by a subsequent agreement between the parties, that the mortgagor might have the estate on payment of principal, interest and costs (*a*); and also the case of a release of the equity of redemption, with a collateral agreement to reconvey on repayment of the purchase-money (*b*). And in this class also is the case of Sabine *v.* Barrell, *infra*.

A further distinction respecting which the authorities do not seem to be very clear, has been also made between mortgages and *defeasible purchases* (as they are called) subject to repurchase within a limited time, where the interest is taken by way

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(*a*) Cotterell *v.* Purchase, Ca. Temp. Talbot, 61.

(*b*) Endsworth *v.* Griffiths, 15 Vin. Ab. 468, Pl. 8; 2 Eq. Ca. Ab. 595, Pl. 6; 5 B. P. C. 184; Bac. Ab. 5, 9.

of rent-charge; for it is said, that in the latter cases the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute.

The cases on which this doctrine rests are Floyer *v.* Lavington (*c*), and Mellor *v.* Lees (*d*).

In the first of these cases, a man in consideration of 800*l.* *granted* to another a rent of 48*l.* in fee, with a condition, that if the grantor should at any time give notice of his intention to pay in the consideration-money by instalments of 100*l.* every six months, and should, pursuant to such notice, pay the said money and interest *at any time during his life*, the grant should be void. There was no covenant to pay the money, and the rate of interest was then 10*l.* per cent., being much above the amount of the annuity. The grantor was dead; the grantee had conveyed the rent-charge to a purchaser, and sixty years had elapsed. A bill was brought by the heir of the grantor to redeem, and it was dismissed. And in the second of these cases, a man mortgaged lands in fee to secure 200*l.* and the mortgagees demised the lands to the mortgagor for 5,000 years, at a yearly rent of 12*l.* for the first three years, and 10*l.* for the residue of the term, with a proviso, that if in the space of three years the 200*l.* was paid with interest, the premises should be re-

(*c*) 1 P. Williams, 268. (*d*) 2 Atk. 494.

conveyed. The money was charity-money directed to be laid out in land, and the rents applied for certain purposes. After forty-eight years, a bill was filed to redeem; a new trustee of the charity resisted on the ground that it was an absolute purchase, and the Master of the Rolls decreed accordingly. On appeal to Lord Chancellor Hardwicke, he said there was a difference between such an agreement as this relating to a rent-charge issuing out of land, and an agreement relating to the land itself. And so likewise the case of creating a rent-charge out of lands and mortgaging a rent-charge was of different considerations. Where, he asked, was the fraud in the present case? The land itself was not parted with; it was merely buying a rent-charge, and it was plainly the intention of the parties, that after the end of three years the interest should be changed into a rent-charge, and be irredeemable.

This point does not seem of late years to have come before the Courts, and it will be safer to consider these cases as decided on the special circumstances attending them, than establishing a general principle for the decision of other cases.

Some writers(*e*) have also considered the general rule, that the mortgagee shall not be allowed to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the land for

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(*e*) 5 Bac. Ab. 12; Powell on Mortgage, 4th Ed. 1 Vol. 173.

a specific sum, in case of default on payment of the mortgage-money at the appointed time, not to apply in case the payment of the money advanced and interest be limited to a particular period, and for this doctrine the case of Tasburgh *v.* Echlin and others(*f*) is advanced as an authority. But this case was determined on circumstances so special that it is scarcely an authority for any subsequent case, and is hardly applicable to the matter in question. The circumstances were briefly these:

John Tasburgh was possessed of the residue of a beneficial term of 116 years in lands in Ireland, under a grant from the crown, at a certain rent. Sir John Eustace was seised of the reversion by a subsequent grant. In May, 1681, Eustace, in consideration of 200*l.*, conveyed the reversion to a trustee for Tasburgh, with a proviso for redemption on payment of 200*l.* and interest within five years, and with a declaration that if the money was not paid in that time, the estate of the trustee should be absolute and indefeasible, and Eustace should be for ever debarred from all right and relief in equity, and Eustace thereby (in default of payment) released to the trustee all his right to redeem. There was no covenant for payment of the mortgage-money. Neither principal nor interest was paid within the five years, and Tasburgh having no remedy at law by reason of the security being reversionary, filed his bill in Chancery in Ireland in 1687, in the name of his

(*f*) Tasburgh *v.* Echlin and others, 2 B. P. C. 265.

trustee, for a foreclosure. Eustace having stood out all process of contempt to a sequestration, appeared by his clerk in May, 1688, and his answer was to be taken by commission in England, and it was ordered that if the same was not returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. A further time was afterwards given him, and no answer being put in, an order for foreclosure was made, unless principal, interest and costs were paid before the 11th of December, 1689. The money was not paid, and Eustace returned to Ireland and died without issue, having acquiesced for eighteen years under the decree; but the order for foreclosure was never made absolute. Tasburgh died in 1691, and Henry Tasburgh entered as his heir at law, and on the 24th of August, 1722, demised the premises to Macnamara for thirty-one years, at a yearly rent of 250*l*. In September, 1723, the co-heiresses of Eustace filed their bill in Ireland, suggesting surprise, fraud and imposition in obtaining the decree of foreclosure, and praying the same might be reversed, and it was decreed. From this there was an appeal, and the decree of reversal was reversed.

It appears difficult to conceive a case decided on grounds less favourable than the preceding, for establishing an exception so extensive as that contended for, to the general principle in question; an exception, too, which would go far to introduce the very evil against which equity has been so careful to guard; and it is conceived, that notwithstanding the

case of Tasburgh *v.* Echlin, the general principle remains unshaken(*g*).

The same beneficial principle which operates in favour of the mortgagor, will operate in favour of his creditors; as(*h*) where a man having made several mortgages of his land, the first mortgagee filed his bill of foreclosure against the mortgagor and the other creditors; a decree *nisi* was obtained, and, to save the estate, one of the creditors and defendants, with the consent of the other creditors, redeemed, upon an understanding between them that the other creditors should redeem him by a given day. The money was not paid, and after twenty years' possession and considerable sums laid out in improvements, redemption was decreed, and the defendant was allowed only necessary repairs and lasting improvements.

It has been already mentioned(*i*), that a mortgage cannot be a mortgage on one side only; it must be mutual(*k*); that is, if it be a mortgage with one party, it must be a mortgage with both. The reverse of this was formerly attempted to be established; viz. that it must be a mortgage with both or with neither, so that it was argued(*l*) none could come to redeem, if the mortgagee could not

(*g*) *Sed vide* Powel on Mortgages, 4 Ed. 1 Vol. 183.

(*h*) Exton *v.* Greaves, 1 Vern. 138.

(*i*) *Ante*, page 24.

(*k*) Howard *v.* Harris, *supra*.

(*l*) Coplestone *v.* Boxwell, 1 Ch. Ca. 1; White *v.* Ewer, 2 Vent. 340.

compel the payment of the mortgage-money; but the former is the true principle. The mutuality, however, need not run *quatuor pedibus;* the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it is in every day's practice, that one party may not be able to foreclose at a time when the other may redeem, as is in the instance cited in Talbot *v.* Braddyl(*m*). "If I lend 100*l.* upon a mortgage, with a proviso to redeem on payment of 112*l.* at the end of two years, there one side cannot foreclose till the end of two years; but if the mortgagor come at the end of the first year and offer to pay the 112*l.* he shall be admitted to the redemption."

And upon this principle the case of Talbot *v.* Braddyl was decided. Certain lands, part in possession and part out on lease for lives, were, in the year 1657, in consideration of 320*l.*, demised to Braddyl for 99 years, at 5*s.* rent reserved, and possession was immediately delivered: there was a proviso, that on payment of 380*l.* in the year 1688, the estate should be redeemed. The land at the time of the mortgage was worth about 15*l.* a-year; the lives fell in, and it became worth 45*l.* a-year. The plaintiff filed his bill to redeem, and Lord Keeper North decreed accordingly, notwithstanding the time specified had not yet arrived, and ordered an account of profits *ab origine*(*n*). It must, however, be observed, that a mortgagor cannot pay off the mortgage debt at any

(*m*) 1 Vern. 395. (*n*) 1 Vern. 183.

other than the time stipulated, without giving six previous months' notice, according to the rule of equity hereafter mentioned.

The preceding authorities show with what jealousy equity has looked on every attempt made to counteract or oppose its interference in behalf of the mortgagor; but its object being to protect him at a time when his necessities may have placed him at the mercy of the mortgagee, *cessante causâ cessat etiam lex*, and therefore the general rule of equity before stated will admit of a very considerable exception in cases, in which there is evidence of intention in the nature of the transaction, that provision was intended to be made by the mortgagor for some branch of his family, or that the mortgage was intended by him in the nature of a family settlement. Thus(*o*) where a man mortgaged lands to his relation in fee, the right to redeem was confined to the mortgagor during his life, and he not having redeemed in his lifetime, his heir filed his bill to redeem, and it was decreed on the principle already stated, viz. that the right to redeem cannot be restricted to a given time; but it being in proof that the mortgagor had a kindness for the mortgagee and intended him the land, and that the claim of redemption was inserted only upon the account that the mortgagor (being a bachelor) might marry and have issue, and that his full intent was if he died without issue, the mort-

(*o*) Newcomb *v.* Bonham, *supra*.

gagee should have the estate without redemption, and that the mortgage-money was really the full value at the time of the mortgage, being a reversion on two lives, which had since fallen in, Lord Keeper North, upon a demurrer to a bill of review, was inclined to reverse the decree; and it was at length agreed the cause should be heard *de integro*, which was accordingly done before the Lord Keeper, when he dismissed the bill. The like doctrine governed a case(*p*) in which a man, on his marriage, surrendered his copyholds to the use of himself and wife, in special tail, with remainder to his wife in fee, upon condition that if he paid 50*l.* to his wife's daughter on a given day, the surrender should be void. The money was not paid. The husband died without issue; the wife sold the estate; and the heir of the husband filed his bill to redeem. The defendant pleaded a purchase for valuable consideration without notice. The Court held it to have been the intention of the husband to reserve the option of paying the money, or letting the settlement stand; and allowed the plea(*q*).

It is rather singular that the case of Jason *v.* Eyres(*r*) was not adjudged as coming within the exception we are now considering, for it should seem to have been directly within its principle. Sir Robert

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(*p*) King *v.* Bromley, 2 Eq. Ca. Ab. 595.

(*q*) *Et vide* Woolston *v.* Aston, Hard. 511; Hampton *v.* Spencer, *supra*; Jason *v.* Eyres, 2 Ch. Ca. 33.

(*r*) Jason *v.* Eyres, *supra*.

Jason being seised of lands subject to a mortgage, entered into a marriage contract, by which it was agreed that the wife's fortune and a certain sum to be advanced by Sir Robert should be paid in reduction of the mortgage, and that for securing the payment of the remainder at the expiration of eighteen months, with interest, in the mean time, half-yearly at six per cent., the lands should be demised to trustees for 500 years; subject to which the lands were to be settled to Sir Robert for life, remainder to his intended wife for life, remainder to trustees in fee, upon trust, if Sir Robert should pay the remainder of the mortgage-debt and interest within the appointed time, if he should so long live, or otherwise within three years from the date of the conveyance, if he should so long live, and procure the lease to be surrendered, then in trust for Sir Robert and his heirs; but in case of failure in payment, or if Sir Robert should die before payment and surrender of the term, then in trust for the wife in fee, not only to enable her to pay the debt and free her jointure thereof, but to the end that she might enjoy the inheritance *for the increase of her fortune*, according to an agreement between them. Sir Robert died, and cross bills were filed by the widow and her second husband to have the inheritance, and by the heir to redeem. And redemption was decreed on the principle before stated, that once a mortgage always a mortgage, and that Sir Robert might have redeemed, had he lived beyond the three years. It might have been fairly contended, that the right of the wife was maintain-

able on the ground of the transaction being intended by way of settlement or family provision (*s*).

A doubt has been raised (*t*), whether an absolute conveyance can be converted into a mortgage by agreement *subsequent*. A slight consideration of principles will, it should seem, satisfy us on this head.

Equity looks to the substance and not to the form of things; and therefore on the one hand it considers a purchaser, after an agreement for an absolute sale, the actual owner before conveyance; and on the other hand where the agreement is for a mortgage, it considers the mortgagor the actual owner after conveyance. Applying these principles to the point in question, as soon as the agreement for an absolute sale is executed, and the consideration paid, the vendor is in equity a stranger to the estate, and any subsequent transaction between him and the purchaser cannot, it should seem, have the effect of divesting the ownership from the purchaser, and revesting it in the original vendor, without the intermediate step of a repurchase by the vendor. There is no greater privity of estate subsisting between them than between any two indifferent persons, and

(*s*) In this case *parol* evidence was offered and read on both sides, which the Court took no notice of, but rejected. It will be observed, that in Newcomb *v.* Bonham, the ultimate decision was expressly founded on *parol* evidence of the mortgagor's intention, and at the present day such evidence would be clearly admissible; Richards *v.* Sims, Barnard. 90.

(*t*) Powell on Mortgages, 4th edit. 1 vol. 156.

no act has been done to shift the ownership back again. Then if the purchaser contract, on repayment of the consideration-money, with interest, to reconvey the estate, this can be of no more avail in equity than if A. should contract to sell the estate to B. on payment of a sum of money with interest. If the purchase-money is not paid, A. may rescind his contract.

Upon this principle was decided the case of Sabine *v.* Barrell (*u*), in which the Lord Keeper said he was satisfied it was not originally a mortgage, but an absolute purchase; and that he thought where there was a clause or proviso for repurchase, the time limited ought to be precisely observed; and it may be thought this was the true principle which decided the before-mentioned cases of Cotterell *v.* Purchase, and Endsworth *v.* Griffith; and in the case of Coplestone *v.* Boxwell (*x*) the point was strongly pressed by the counsel for the defendant, but the case was referred to arbitration.

An important consequence results from this distinction between a mortgage and a purchase with a proviso for repurchase, viz. that in the latter case if the party to whom the conveyance is first made dies seised, and after his death the option is declared by the other party to take the estate, the purchase-money may belong to the heir, and not, as it would if it had been a mortgage, to the execu-

(*u*) Sabine *v.* Barrell, 1 Vern. 268.

(*x*) Coplestone *v.* Boxwell, 1 Ch. Ca. 1; 3 Salk. 241.

tor. Thus in a case in which an estate had been conveyed by one Wareham to Sir Richard Grobham, and afterwards Sir Richard demised the lands to Wareham for seven years, at a rent of 230*l.*, with a proviso, that if Wareham or his heir should within seven years be desirous to repurchase, and signify the same to Sir Richard, his heirs or assigns, and pay him or them 3000*l.*, then he or they would assure the lands to Wareham. Subsequently to the decease of Sir Richard, Wareham made his election to repurchase, and the money was decreed to the heir of Sir Richard, in preference to his executors, on the ground that it was not the case of a mortgage, but a mere collateral agreement to repurchase (*y*).

It may be further remarked, that the circumstance of an agreement to reconvey, although entered into *at the time* of conveyance, is not sufficient to convert the transaction into a mortgage, if there be evidence to rebut the presumption (*z*), and further that an estate redeemable may be rendered irredeemable by evidence of title, as where (*a*) copyholds were surrendered by way of mortgage, and by a second surrender the mortgagor limited them to himself for life, remainder to his wife for life, remainder to the mortgagee in fee. And although the words "subject to the trusts of the former surrender" were added, yet the court refused redemption, and con-

(*y*) Thornborough *v.* Baker, reported in 3 Swanston, 631.

(*z*) Sabine *v.* Barrell, *supra.*

(*a*) Perry *v.* Marston, 2 B. C. C. 397.

sidered the words to mean, "subject to the preceding life estates."

If a renewable lease be assigned, by way of mortgage, an agreement between the landlord and the mortgagee releasing the right of renewal, without the concurrence of the mortgagor or his representatives, cannot be sustained (*b*).

It scarcely need be noticed, that the mortgagor cannot under his covenant for further assurance on default in payment, be called upon to release his equity of redemption, and that he can under such covenant be required to confirm the mortgage only (*c*).

(*b*) O'Reilley *v.* Fetherstone, 4 Bligh, N. S. 161.

(*c*) Atkins *v.* Uton, 1 Lord Raym. 36; Comb. 318.

CHAPTER IV.

OF THE NATURE OF AN EQUITY OF REDEMPTION, ITS RIGHTS AND INCIDENTS.

THE right or equity of redemption being thus established, it is necessary to consider the nature of that right, against whom it lies, and its incidents or qualities.

First, then, of the nature of an equity of redemption.

It has been already shewn, that by the common law, the legal ownership of the land on the execution of the deed of mortgage, is transferred to the mortgagee, subject to be divested on performance of the condition, and that a mere right of reentry on performance of condition remains in the mortgagor, of which advantage may be taken by him or his heirs alone, being neither alienable nor devisable. These doctrines were at first attempted to be applied in equity to the right to redeem after condition broken, without reference to the principles, on which that right was founded, and accordingly in Roscarrick *v.* Barton (*a*), heard in Chancery the 21st of February, 23 and 24 Car. II.,

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(*a*) Roscarrick v. Barton, 1 Ch. C. 217.

an equity of redemption was said to be but a mere right; a right to a bill in equity, and not such an inheritance as could be entailed within the statute *de donis;* and even so late as in the case of Casborne *v.* Scarfe (*b*), heard before Lord Chancellor Hardwicke, in Hilary vacation, 1737, the like doctrine of the equity being a mere right was advanced and strongly pressed on the Court to rebut the claim of an husband as tenant by the curtesy. But equity adhering to the principle of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence, and looking at the substance and not at the form of things (*c*), held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and therefore Lord Hardwicke, in Casborne *v.* Scarfe (*d*), denied the argument, that the equity was but a right, and putting the question on sound principles, declared the equity to be *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption then is, in equity, the ancient estate in the land without change of ownership.

Questions of great nicety formerly arose in reference to the persons on whom this equity of re-

(*b*) Casborne *v.* Scarfe, 1 Atk. 602.
(*c*) Francis's Maxims, Max. 13.
(*d*) *Supra.*

demption was binding, but which for the most part have now ceased to have any interest: Lord Hale described it to be, not merely a trust, but a title in equity, and to be *inherent* in the land, and binding on *all persons*, whether in the *post* or otherwise (*e*), and, although on the immediate establishment of the equity of redemption, ancient prejudices so far prevailed as to lead to a decision, that lands conveyed to a mortgagee in fee, became subject to his legal incumbrances, and to the dower of his wife (*f*), and therefore, in order to prevent the latter, it was usual to convey the lands to two persons in joint tenancy, yet this misconception was soon remedied, and the rights of the parties put upon the proper footing.

Notwithstanding, however, the strong opinion entertained by Lord Hale of the binding quality of this equity, great doubts once prevailed whether the redemption of a mortgage could be had against the king (*g*). And it was very recently decided (*h*) that a lord of a manor was not bound by the equity on an escheat, if notice of such equity did not appear on his court rolls, although in another case (*i*) it was held he was bound by the equity if on the rolls there was a *reference* to a deed giving notice of it, and that the mortgage money belonged to the personal representative of the mortgagee, and not to the lord.

(*e*) Pawlett *v.* The Attorney-General, Hardw. 465.

(*f*) Nash *v.* Preston, Cro. Car. 190; 1 Eq. Ca. Ab. 311; Co. Litt. 204, n. 1.

(*g*) Pawlett *v.* The Attorney-General, *supra*.

(*h*) Attorney-General *v.* The Duke of Leeds, 2 Mylne & Keen, 343.

(*i*) Weaver *v.* Maule, 2 Russel & Mylne, 97.

A recent statute(*k*) has been passed which, by preventing escheated or forfeited lands of trustees or mortgagees from vesting in the crown, or in the subject, has removed any difficulty which, within the scope of probability, can in future arise on this subject.

By that statute, after reciting that great inconvenience had been found to result to persons beneficially entitled to real or personal property, by the escheating or forfeiture thereof to his majesty, to corporations, to lords of manors, and others, in consequence of the death without heirs, or the conviction for treason or felony of a *trustee* (*l*) in whom, or in whose name the same was vested, and it was expedient the same should be remedied, it is enacted, that where any person seised of any land, upon any trust, *or by way of mortgage,* dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the 11th year of King George the Fourth, and the 1st year of King William the Fourth, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their decrees and orders in certain cases," in case such trustee or *mortgagee* had left an heir, and that it was not known who was such heir, and that such conveyance shall be as effectual as if there was such heir.

(*k*) 4 & 5 Will. IV. cap. 23.

(*l*) The word "mortgagee" is omitted in the recital in the statute.

On this enactment in may be proper to remark, that although it refers to the preceding statutes, as having provided for the case of a mortgagee dying leaving an heir, but it was not known who was such heir, yet in point of fact that particular event was *casus omissus* in those former statutes, which only met the case of a *trustee* dying, leaving an heir, and it was not known who was such heir (*m*). But as the 4 & 5 Will. IV. refers to the case of the trustee, as well as to that of the mortgagee, the mistake in the reference may be considered as immaterial. It is however to be wished that the error in the former statutes should be speedily remedied.

The statute of the 4 & 5 Will. IV. also enacts that no land, chattels, or stock vested in any person upon any trust, *or by way of mortgage*, or any profits thereof, shall escheat or be forfeited to his Majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall *remain* in such trustee or mortgagee, or survive to his co-trustee, or descend, or vest in his representative, as if no such attainder or conviction had taken place.

And that the several provisions of the act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or

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(*m*) Ex parte Goddard, 1 Mylne & Keen, 25; Ex parte Stanley, 8 Simons, 320; *et vide infra*.

some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law, or by construction of equity.

But that nothing in the act contained shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee *or mortgagee*, so far as relates to any beneficial interest therein of any such trustee or mortgagee; but such land, chattels, or stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if the act had not passed.

The act then recites that it was expedient to relieve persons beneficially entitled to real or personal property which had then already escheated or become forfeited to his Majesty, to corporations, to lords of manors, or others, *by any of the means aforesaid*. And it enacts, that in all cases where before the passing of the act any person possessed of or entitled to any land, chattels, or stock, or any right to or interest in any land, chattels, or stock, as *a trustee* thereof, either in whole or in part, or jointly with some other *trustee or trustees*, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every such case the said land, chattels, or stock, or the right thereto or the interest therein, which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control, and disposition

of the Court of Chancery, for the use of the party beneficially interested therein, in such manner and subject in all respects to such rights and incidents and to such orders and regulations of the said Court under the provisions of the said act of the 11th of George the Fourth, and of the first year of his present Majesty, as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of, or not amenable to the process of the said Court, without having been so convicted; provided that nothing in this clause contained shall extend to any land, chattels, or stock vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of the act shall have been actually vested in possession, or reduced into possession by the party entitled thereto, by virtue of any such escheat or forfeiture.

It will be observed that this latter clause is restricted to the case of *a trustee*, and therefore, according to the cases of Ex parte Goddard and Ex parte Stanley, the case of a mortgagee is excluded, and, consequently, as to the latter, the act is prospective only. This was probably a mistake, but these statutes, relating to the estates of trustees and mortgagees, are very loosely drawn.

The equity of redemption, as in the case of a mere trust, will not of course be binding on a bonâ fide purchaser for a valuable consideration, if he takes without notice.

Next as to the incidents and qualities of an equity of redemption.

It has been already mentioned that an equity of redemption is *an estate* in the land without change of ownership. It necessarily follows, that its line of devolution must in the course of descent be governed as the land itself would have been by the general law, or by the lex loci; and, therefore, if the land be of gavelkind tenure, the equity of redemption will be divisible in like manner; or if the tenure be borough-English, the youngest son will be entitled; and so of the like (*l*), and on the like principle (*m*), if a devised estate is mortgaged by the testator, the mortgage, whether in fee or for a term of years, if confined to the purpose of the security, is but a revocation *pro tanto*. A devise of the equity of redemption itself must be also valid (*n*) if attended with the like technicalities as the law requires for a devise of the land. A doubt has been raised (*o*) whether prior to the breach of the condition, when, as has been already explained, the mortgagor has a right of re-entry only, a valid devise of the land can be made; and the ground of objection is, that the benefit of a condition is not devisable. There seems *at law* to be sound reason for the objection; for a right of re-entry can scarcely be placed on the footing of a *possibility*, accompanied with an interest, as has been attempted by a preceding writer (*p*), and devisable as

(*l*) 2 Ves. 304.

(*m*) Thorne *v.* Thorne, 1 Vern. 182; Hall *v.* Dunch, 1 Vern. 392.

(*n*) Phillips *v.* Hele, 1 Rep. in Ch. 190. (*o*) 2 Ch. C. 8.

(*p*) See Powell on Mortgages, 4th edit. 348, who refers to Roe *v.* Jones, 1 H. Bl. 30.

such; but nevertheless if such a devise could not be maintained *at law*, which, it is apprehended, is the total amount of the question, it would be good in equity, whether the mortgagor should die before or after breach of the condition. It is not, however, the intention in this place to enter into the doctrine of the devise of lands in mortgage, but to reserve the consideration of it to a subsequent chapter.

Prior to the decision that an equity of redemption was *an estate* in the land, and so long as the notion prevailed, that it was but a *right*, the limitation of it by way of entail or in strict settlement, seemed out of the question, and it was considered, that such an entail, if it could subsist, would tend to a perpetuity. But when the equity was declared to be the ancient estate without change of ownership, it became. of course, subject to all the limitations to which other estates in equity were liable (*q*).

It was once received in equity, that an entail in a trust estate and remainders over might be barred by any mode of assurance whatever, as by bargain and sale, covenant to stand seised, feoffment, and even by will (*r*); and in accordance with this doctrine it is said to have been decided that tenant in tail of an equity of redemption might devise it for payment of debts (*s*), and it seems even to have been doubted, whether a common recovery could be suffered of an equitable entail, unless upon a consideration (*t*). But

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(*q*) Hard. 469.
(*r*) 1 Vern. 14, note.
(*s*) Turner *v.* Gwinn, 1 Vern. 41, 99.
(*t*) Goodrick *v.* Brown, 1 Ch. Ca. 49.

on a question before Lord Chancellor Hardwicke (*u*), whether an equitable remainder on an estate tail was barred by a settlement and will, he decided with great clearness, that the remainder was not barred, and the law became settled, that an equitable entail and remainders were barrable by such mode of assurance only as would bar a legal entail and remainders. By the 3 & 4 Will. IV. c. 74, abolishing fines and recoveries, a power of disposition has been given to tenant in tail of freehold lands by simple deed, inrolled in Chancery. To the provisions of the statute, more particular reference will be made in other parts of this Treatise.

In consistency with the anomalous decision of equity, that there should be a tenancy by the curtesy, but not dower, of a trust estate, the like was decided of an equity of redemption.

The right to tenancy by the curtesy, was at first disputed on the notion already mentioned, that the equity was but *a right* of which a seisin could not be had by the wife, so as to give title to the husband; but Lord Hardwicke in deciding the equity to be an estate, decided also the right to the tenancy by the curtesy (*x*).

The chief arguments relied on (*y*) by the widow for right to dower of an equity of redemption, were, first, that dower was a right, founded on principles of morality and equity, and, secondly, that an equity

(*u*) Kirkham *v.* Smith, Amb. 518; and see Legat *v.* Sewell, 2 Vern. 552.

(*x*) Casborne *v.* Scarfe, *supra.*

(*y*) Dixon *v.* Saville, 1 B. C. C. 326.

of redemption was to be distinguished from a mere trust, the latter being the creature of the parties themselves, who, it might be supposed, had voluntarily relinquished the legal incidents and privileges it wanted; but that the former was the creature of the Court, founded on the principle, that the mortgage was nothing originally more than a pledge, and that the original ownership remained in the mortgagor, subject to the legal title of the mortgagee, so far as such legal title was requisite to the end of his security, and that accordingly the estate of the mortgagee was not treated by equity as any title beyond that extent, and that his beneficial interest, though the mortgage was in fee, was considered only as personal estate; but the Lords Commissioners considered the point so well settled, it would be wrong to discuss it much, and the bill was dismissed, but without costs, the defendants not praying them (*z*).

The statute of the 3 & 4 Will. IV., cap. 105, has prospectively removed this anomaly in cases of women married subsequently to the 31st of December, 1833, by enacting, that when a husband shall die beneficially entitled to any land for an interest, which shall not entitle his widow to dower out of the same at law, and such interest, whether equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same.

(*z*) *Et vide* Banks *v.* Sutton, 2 P. Wms. 700; Attorney-General *v.* Scott, Cases *temp.* Talbot, 138, and cases in note; D'Arcey *v.* Blake, 2 Sch. & Lefroy, 391.

It will be observed, that the statute embraces estates of which the husband shall be seised partly for a legal interest, and partly for an equitable interest. This has more immediate reference to the limitations formerly generally in use in bar of dower, which, being to the husband for life, with the remainder to a trustee during his life in trust for him, with remainder to himself in fee, were in fact partly legal and equitable. The words in the statute will of course apply to any similar case; as if the estate is limited to a trustee for the husband for a term of years or other limited interest with remainder to the husband in fee or in tail, or to the husband for a term of years or other limited interest with remainder to a trustee in fee, in trust for the husband in fee or in tail, or in any other manner which shall give the husband the sole beneficial profits of the land, as realty, for an estate amounting to an estate of inheritance in possession. The statute also gives to widows a right of dower in estates in respect of which their husbands may have been entitled to a right of entry or action, although they shall not have recovered possession, provided the dower be sued for and obtained within the period during which such right of entry or action might be enforced.

These benefits have, however, been dearly purchased by women, the statute having placed the right to dower absolutely within the disposal of the husband, by alienation or charge, or by simple declaration of intention by deed or will (*a*).

A devise also to the widow by her husband of any

(*a*) An involuntary disposition by bankruptcy appears to be hardly within the provisions of the statute; *sed quære.*

lands out of which she would be entitled to dower if not so devised, will be a general bar of dower. But a bequest to her of personal estate will not have that effect, unless (in both cases) a contrary intention is declared by the will.

Women married prior to the 1st of January, 1834, are not within the statute, either in respect of its disabilities or benefits.

Prior to the statute of frauds (*a*), trust estates, not being cognizable at common law, were not extendible on an elegit, statute or recognizance (*b*). By that statute it was enacted, that it should be lawful for every sheriff or other officer to whom any writ or precept should be directed, at the suit of any person or persons, of, for, or upon any judgment, statute or recognizance thereafter to be made or had, to do, make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments as any other person or persons were in any manner seised or possessed, or thereafter should be seised or possessed, *in trust* for him against whom execution was so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution thereafter should be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or hereditaments of such estate as they be seised of in trust for him *at the time of such execution sued,* which lands, &c. should accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as should be

(*a*) 29 Car. II., cap. 3, sec. 10. (*b*) 1 Roll. Ab. 888, 6.

so seised or possessed, in trust for the person against whom such execution should be sued. And the statute further enacted, that if any *cestui que trust* thereafter should die, leaving a *trust in fee simple* to descend to his heir, such trust should be deemed and taken to be assets by descent, and the heir should be liable to and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended.

Since the passing of this statute, trust estates of inheritance have become subject to an execution at law; but trusts of a chattel interest remain in the same plight as they did prior to the statute, and therefore it was held, that the sheriff was justified in an instance in which the debtor had no other property than an equitable interest in a term of years, in returning *nulla bona* to the writ of *fieri facias*, at the suit of a judgment creditor (*c*).

This latter decision confirmed the preceding decisions in equity, that an execution at law will not affect *the equity of redemption of a term* (*d*).

It is also now admitted, that the equity of redemption of an estate of inheritance is not extendible, although the precise point does not seem to have been

(*c*) Scott *v.* Scholey, 8 East, 466; *et vide* Metcalf *v.* Scholey, 2 New Rep. 461, S. P.

(*d*) Burdon *v.* Kennedy, 3 Atk. 738; Lyster *v.* Dolland, 1 Ves. jun. 431; 3 B. C. C. 480.

quite so directly decided. In Lyster *v.* Dolland (*e*), a mortgagee of a *chattel* interest obtained possession by an ejectment at law of the leasehold premises, and afterwards proceeded against the mortgagor under his bond, and obtained judgment, and took the mortgage premises in execution. The sheriff sold the whole interest in the term to a trustee for the mortgagee. On a bill filed to redeem, Lord Chancellor Thurlow seems at first to have thought the equity of redemption in a term might be taken in execution under the statute, and his chief difficulty, on first hearing the cause, arose from the sheriff having sold the whole interest in the term under the execution, and not merely the equity of redemption; but on the next day he observed, that on looking into the statute he did not think the case within it; he had thought the words of the statute had been much larger, and that the words "equitable interests" were contained in it, but found himself wrong, and he thereupon let the plaintiffs in to redeem. It does not clearly appear from the report in Vesey, whether Lord Thurlow's observations went to equities of redemption generally, or were confined to the equity of redemption of a term; but Brown, in his Report, says he was informed the Lord Chancellor decreed in favour of the plaintiffs, on the ground that an equity of redemption was not liable to be taken in execution under the 29 Car. II., c. 3, and his lordship desired that might be taken notice of as the ground of the judgment. However, according to the cases of Scott *v.* Scholey and Metcalf *v.* Scholey, the sheriff would not have been justified in the sale, even if it

(*e*) *Supra.*

had been a mere trust estate, and the case of Lyster *v.* Dolland may therefore be considered as proving too much. In Plunkett *v.* Penson (*f*), heard before Lord Chancellor Hardwicke, in which the principal question was, whether an equity of redemption of a mortgage in fee of a *trust estate* was legal or equitable assets, his lordship said, he should be glad to know if there was any instance where an *equity of redemption* had ever been held to be liable to the execution of a bond creditor in the lifetime of the mortgagor, to which the counsel answered, they could not recollect any instance where it had been so held. On the principal question, in that case, his lordship said, " I do agree, that if a mere trust estate descends upon an heir at law, it will be considered as legal and not as equitable assets, and this is founded upon the third clause of the statute, which gives a specialty creditor his remedy at law, by an action of debt against the heir of the obligor, but it has not made a mortgage in fee of a trust estate subject to the same thing. If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law; and if the specialty creditor should bring an action against the heir, he may plead *riens per descent.* Therefore, if the plaintiff is under a necessity of coming here for relief, this Court will act according to its known rule

(*f*) 2 Atk. 290.

of doing equal justice to all creditors, without any distinction as to priority."

Now this was certainly deciding that an equity of redemption was not to be considered as a *mere trust estate by descent*, for, if the equity of redemption had been a trust by descent, the heir could not since the statute have pleaded *riens per descent;* and if it is not to be considered in the light of a trust estate, then it is not within the words of the third section of the statute, and consequently not extendible (*g*). In this doctrine the Courts and the Profession have acquiesced, and the case of Plunket *v.* Penson was recognized in Scott *v.* Scholey, and part of the words above quoted were cited by Mr. Justice Lawrence with approbation, and it may therefore be admitted as settled doctrine, that an equity of redemption of an estate of inheritance is not extendible under a judgment at law.

However, although the equity is not extendible by the sheriff, the judgment forms an equitable lien on the land, and the creditor may file his bill to redeem, as will be hereafter explained.

Assets in a Court of Equity are legal or equitable. They are considered equitable either in respect of the testator's intent, as in the case of a charge upon the real estate for payment of debts generally, or in respect of the interest of the party in the property being purely equitable, and not made legal assets by any statute (*h*). If they are of chattel interest and

(*g*) *Et vide* Lyster *v.* Dolland, 1 Ves. jun. 436, at the end of case.
(*h*) Fonbl. Treat. on Equity, 2 vol. 399.

legal, they will be administered by the personal representatives of the deceased in a due course of administration. If they are assets real, and legal, the heir or devisee will take, subject to the debts of his ancestor or testator. If assets, whether real or personal, are equitable, they will be applicable in satisfaction of all the creditors *pari passu*, excepting that judgment creditors having a general lien, and thus having a right to come in and redeem a subsisting mortgage, are also entitled to preference in the distribution of equitable assets, consisting of an equity of redemption of a mortgage in fee (*i*). But after a bill filed by creditors, the executor cannot by confessing judgment give preference (*k*), and the Court will, after a decree against the executor to account, restrain creditors from proceeding against him at law, and direct them to come in under the decree (*l*).

Before the statute of frauds, all trust estates were equitable assets. By that statute, as before remarked, *trust estates in fee simple* are rendered liable to an execution at law.

A trust estate of inheritance, therefore, became legal assets; and, by analogy, it was held that an equity of redemption was also legal assets (*m*), but

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(*i*) Sharpe *v.* the Earl of Scarborough, 4 Ves. jun. 538.

(*k*) Solley *v.* Gower, 2 Vern. 61.

(*l*) Potts *v.* Layton, Toller's Executors, 456.

(*m*) 2 Freem. Pl. 130. The reporter adds, "Come al moy fuit dit per Sir F. Winnington, il esteant de concilio en le case;" *et vide* 3 Leon. 32.

in Plunket *v.* Penson (*n*) Lord Hardwicke, as before remarked, determined them to be equitable, and the heir may, on an action against him by a specialty creditor, plead *riens per descent* (*o*).

If the mortgage is but for term of years, leaving a legal reversion in the mortgagor, the reversion in fee will be of course legal assets (*o*), for the specialty creditors might have judgment at law with a *cesset executio* until the reversion fell into possession, as before observed (*p*). The judgment at law will be only of assets *quando acciderint*, but the creditor may, by bill in equity, compel the heir to sell the reversion, even (as it seems) if it be expectant on an estate tail (*q*).

If the mortgage be in fee, and there be judgment creditors, although, as before noticed, they cannot extend the equity, they, nevertheless, have a general lien in equity upon it, and consequently the equity of redemption will, as to them, be deemed legal assets, and applicable accordingly (*r*).

An equity of redemption of a leasehold estate is equitable assets (*s*), notwithstanding the doubt thrown out in Sharpe *v.* the Earl of Scarborough.

(*n*) Plunket *v.* Penson, *supra*. *Et vide* Solley *v.* Gower, *supra*; Clay *v.* Willis, *infra*.

(*o*) *Supra*, page 57; *et vide* Placknet *v.* Kirk, 1 Vern. 411.

(*p*) *Supra*, page 57.

(*q*) *Vide* Tyndale *v.* Warre, 1 Jac. 212, and cases there cited.

(*r*) Sharpe *v.* Earl of Scarborough, *supra*.

(*s*) The creditors of Sir Charles Cox, 3 P. Wms. 342; Hartwell *v.* Chitters, Amb. 308; Clay *v.* Willis, 1 Barn. & Cress. 372.

It seems to have been formerly held (*s*), that if an equity of redemption was devised to *executors* for payment of debts, it became legal assets; for that such a devise shewed the testator's intention that it should be so applied. But this doctrine is now overruled (*t*), and an equity of redemption remains equitable assets, whether devised to trustees generally or to executors for payment of debts (*u*).

Whether estates are devised to trustees to sell for payment of debts, or descend on the heir, charged by the ancestor with the payment of debts, will make no difference in their being accounted equitable assets (*x*).

It has been already said, that a mortgage made subsequently to a devise is but a revocation *pro tanto* in equity. In like manner, the execution of a power by way of mortgage, whether in fee or for years, is but an appointment *pro tanto* (*y*), unless there be on

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(*s*) Girling *v.* Lee, 1 Vern. 63.

(*t*) See Lewin *v.* Okeley, 2 Atk. 50, and cases in note.

(*u*) Clay *v.* Willis, *supra*; Silk *v.* Prime, 1 B. C. C. 138; Barker *v.* May, 9 Barn. & Cress. 489.

(*x*) Bailey *v.* Ekins, 7 Ves. 319; Shiphard *v.* Lutwidge, 8 Ves. 26.

(*y*) Thorne *v.* Thorne, 1 Vern. 141; and Perkins *v.* Walter, *ibid.* 97. Note *.

* The marginal extract in this case mistakes the facts, for it is there stated to be an authority, that a mortgage, after a voluntary settlement, with power of revocation, and a will in confirmation of it, is a revocation *pro tanto* only; but it does not appear from the circumstances stated, that the voluntary settlement contained any such power, nor did it require it to give effect to the mortgage, the

the face of the instrument an indication of an ulterior intention, inconsistent with a future exercise of the power (*z*), and the right of redemption will remain in the persons entitled to the estate in default of appointment (*a*).

On the principle before stated, that the mortgagor remains the actual owner of the estate, it has been determined (*b*) that the mortgagor of an advowson has a right to nominate to the living on a vacancy, and to compel the mortgagee to present his nominee, even although there be an actual engagement between them, that the mortgagee shall, after default made, have the right to present.

In like manner an equity of redemption may itself

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settlement itself being void, under 27 Eliz., as against a *bonâ fide* purchaser, which a mortgagee *pro tanto* is. It contained a power for the tenant for life to appoint the estate for a thousand years at any rent; he accordingly appointed the estate to trustees, upon trust, by sale or mortgage, to raise certain sums for payment of debts, and to discharge a mortgage, and for other purposes, and in *this deed* reserved a power of revocation, and afterwards mortgaged the estate, having first, by his will, confirmed the voluntary settlement, and appointed other sums to be raised out of the term. It was contended, the subsequent mortgage revoked the will and the appointment to the trustees, *sed non allocatur*, "it might be a revocation *pro tanto*, but not otherwise."

(*z*) Fitzgerald *v.* Fauconberg, Fitzg. 207.

(*a*) Innes *v.* Jackson, 16 Ves. jun. 356, *et vide infra.*

(*b*) Jory *v.* Cox, Prec. Chan. 71; Amhurst *v.* Dawling, 2 Vern. 401; Galley *v.* Selby, Stra. 403; Mackenzie *v.* Robinson, 3 Atk. 559, which over-ruled Gardiner *v.* Griffith, 2 Pr. Wms. 403. *Et vide infra.*

become the subject of mortgage, and each equitable mortgagee shall have preference according to his priority in time, the maxim of equity being, *Qui prior est in tempore, potior est in jure* (*c*). Of the protection afforded by the statute law to the mortgagee of an equity of redemption, and by what means a subsequent mortgagee of the equity of redemption may obtain preference to a prior mortgagee of the equity, an explanation will be given in the subsequent chapters.

The equity of redemption being an estate in the land, it followed that the doctrine of *possessio fratris* would apply in exclusion of the half blood (*d*).

But the law in this respect is materially affected by the 3 & 4 Will. IV. c. 106 (*e*), which has enacted, that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir. And the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be enabled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor, where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the

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(*c*) Fonb. Treat. Equ. vol. i. 319, and cases in note. And see also *Ex parte* Knott, 11 Ves. jun. 609.

(*d*) Casborne *v.* Scarfe, 1 Atk. 603. (*e*) Sec. 9.

father, and their issue and the brother of the half blood on the part of the mother shall inherit next after the mother.

Whether an equity of redemption is subject to escheat does not seem to have been precisely determined; but the reasoning of the Lord Keeper in Burgess *v.* Wheate (*e*), as well as the principles on which he determined that a mere trust estate was not so subject, fairly leads to the conclusion that an equity of redemption is not liable to escheat, for, as remarked by the Lord Keeper, it is a question of tenure and not of forfeiture, and the right to escheat arises *pro defectu tenentis;* so long as the lord has his tenant to perform his services, the land cannot revert in demesne, and the crown has no equity on which to sue a *subpœna.* How far the Court would interfere, in case the mortgagee in such case should also proceed on his bond or covenant to recover the debt from the personal representatives of the mortgagor, remains to be seen; but according to the opinion of the Master of the Rolls, in Burgess *v.* Wheate (*f*), the Court would, under such circumstances, direct the mortgagee to convey the estate to the executors. This, however, was merely an *obiter dictum,* and cannot be relied on; but it may be considered clear, equity would not allow the mortgagee to have both the money and the estate.

(*e*) Burgess *v.* Wheate, 1 Bl. Rep. 123; *et vide* Fawcett v. Lowther, 2 Ves. 304.

(*f*) 1 Blackst. Rep. 149.

An equity of redemption (except of copyholds) is subject to crown debts, and may be sold under an extent of the Court of Exchequer, pursuant to the 25 Geo. III. c. 35 (*g*).

Notice of motion for an order for sale should be given to the mortgagee before the motion can be made, and the Court will order a reference to ascertain what is due on the mortgage (*h*).

An equity of redemption is liable to forfeiture for treason, but not for felony (*i*).

(*g*) 13 Eliz. c. 4; Rex *v.* Delamotte, Forrest. R. Exch. 162.

(*h*) King *v.* Coomber, 1 Price, 207.

(*i*) Attorney-General *v.* Sands, Hardres, 488; Lovell's case, 1 Salk. 85; Attorney-General *v.* Crofts, 1 B. P. C. 222. *Et nota.*— By the 54 Geo. III. cap. 145, corruption of blood is in all cases saved except for treason, petit treason, and murder.

CHAPTER V.

OF STATUTES MERCHANT, STATUTES STAPLE, RECOGNIZANCES, AND ELEGIT.

BEFORE we proceed further, it is proper to inquire into the nature of certain compulsory modes by which lands may, by force of the statute law, be rendered a security for debt.

It has been already noticed, that the common law did not, as between subject and subject, allow the lands themselves to be taken in execution on a judgment for debt or damages; for if they might have been so taken, then a tenant might have been intruded on the feud against the lord's consent; and thus by a circuitous route, an alienation might have been effected against his will. The creditor therefore could only, by the common law writ of *fieri facias*, take the goods and chattels of his debtor, and by writ of *levari facias*, take the growing profits of the land; and even of these latter he might be deprived by subsequent alienation of the land itself. The crown indeed might at common law have taken the lands of its debtor, by force of its prerogative, and a creditor might, on judgment against the heir, on a specialty debt of the ancestor, have taken the land; for otherwise he would, as against the heir, have been remediless.

The inconvenience of this rigid system began to be soon felt by a growing commercial state, and the

statute of Acton Burnell (*a*) in its preamble notices that merchants who had lent their goods to divers persons were greatly impoverished, because there was no speedy law provided for them to have recovery of their debts at the day of payment assigned, and by reason thereof many merchants had withdrawn, to the damage as well of the merchants as of the whole realm. And it therefore provided a remedy hereafter noticed of a *statute merchant*, being a bond or obligation on record, taken before the mayor of the place, and entered on record, and sealed with the seal of the debtor and the king.

A much more extensive remedy was soon after provided for the creditor by the 13 Edward I. cap. 18, which enacted, that when a debt was recovered *or acknowledged* in the King's Court, or damages awarded, it should be in the election of the creditor to have a writ of *fieri facias* unto the sheriff, to levy the debt of the lands (*i. e.* the profits) and goods, or that the sheriff should deliver to the creditor all the chattels of the debtor, (saving only his oxen and beasts of his plough,) and the one-half of his land, until the debt was levied upon a reasonable price or extent; and if he were put out of that tenement he should recover by a writ of novel disseisin, and after, by a writ of redisseisin, if need should be. In consequence of this statute a writ was framed since called a writ of elegit, from the words of the entry on the roll, *Quod elegit sibi executionem fieri*

(*a*) Statute of Acton Burnell, 11 Edw. I.

de omnibus catallis et medietate terræ. On the suing out of this writ, the sheriff must impannel a jury, who are to inquire into all the goods and chattels of the debtor, and make an appraisement of the same, and the sheriff must deliver them to the creditor at the appraised price; and the jury are also to inquire as to his lands (not being copyhold, which are not liable to be extended under an elegit) (*b*), and appraise their value, and set out and deliver to the creditor a moiety of them by metes and bounds, at the extended value. But the sheriff need not deliver a moiety of *each* tenement (*c*); it is sufficient if it appear the lands extended are but a moiety in value of the whole. If the sheriff extends more than a moiety, and the fact appears on the return, it seems the execution is merely void (*d*).

This statute extending to the case of a debt *acknowledged* in the King's Court, a mode of security was suggested, which gave the creditor an immediate hold upon the land, and at the same time saved him the expense of actual process to obtain judgment. This was by a warrant of attorney, authorizing certain attornies to appear for the debtor, and confess the debt in a court of record, whereupon judgment might be forthwith entered up, and a

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(*b*) Heydon's case, 3 Co. 9; nor, according to Rolle, is a lease by licence, 1 Roll. Ab. 888, 3.

(*c*) Den *v.* Lord Abingdon, Doug. Rep. 473.

(*d*) Putten *v.* Purbeck, 2 Salk. 563. *Sed vide contra* Carthew, 453. *Et vide infra.*

writ of execution *instanter* sued out (*e*). Between a judgment so obtained and a judgment obtained in an actual action, Lord Kenyon, in Doe *v.* Carter, said he saw no difference (*f*), since the object of the former was merely to shorten the process and to lessen the expense of the proceeding.

When lands are extended under an elegit, they are delivered to the creditor to hold "*quousque debitum satisfactum fuerit*," that is, until the debt recovered, and stated damages are repaid, and no other damages or expenses, nor even interest are allowed (*g*); and as the annual value of the land extended is ascertained by the inquisition and extent, the time when the debt will be satisfied is certain, and the debtor may re-enter without a previous writ of *scire facias* (*h*). But as the lands are always extended much below the real value, and as the debtor cannot on a writ of *ad computandum* at law insist on the creditor's doing more than account for the extended value, he is

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(*e*) Holbird *v.* Anderson and another, 5 Term Rep. 235.—Note—In this case, the debtor had been sued to judgment by a creditor, who was entitled to sue out execution on the 8th of May, on which day the debtor voluntarily went to another creditor, and gave him a warrant of attorney to confess judgment against him, on which judgment was immediately entered up, and execution levied on the same day, two hours before the first creditor's execution reached the sheriff's office; and it was held the preference was not unlawful nor fraudulent within the meaning of the 13 Eliz. c. 5. *Sed vide infra* as to judgments obtained on warrants of attorney in cases of bankruptcy.

(*f*) Doe *v.* Carter, 8 Term Rep. 61.

(*g*) Fulwood's case, 4 Rep. 67; 2 Inst. 678.

(*h*) Burwell *v.* Harwell, Cro. Car. 598; Fulwood's case, *supra*.

driven for remedy into a court of equity, which acting on its principle, that he who seeks equity shall do equity, will compel him to pay interest on the debt, although it should exceed the penalty on the judgment (*i*).

The sheriff formerly delivered actual possession of the land extended. He now delivers legal possession only (*k*). Whether the plaintiff may enter by virtue of the elegit, or must obtain actual possession by ejectment, does not appear clearly decided, although the authorities preponderate in favour of the first proposition (*l*). If, however, there be a tenant in possession under a lease granted prior to the date of the judgment (*m*), the creditor cannot succeed in ejectment; for the legal title must prevail, even although he give the tenant notice that he does not mean to disturb his possession, but only to get into the receipt of the profits. He may, however, extend a moiety of the reversion and of the rent, and he will have the like remedies for the moiety of the rent as the debtor himself had. (*n*). The debtor cannot, as before observed, by writ *ad computandum* at law, compel the creditor to account for the profits beyond the extended value; yet, if by some casual profit, the cre-

(*i*) Godfrey *v.* Watson, 3 Atk. 517; Owen *v.* Griffith, Amb. 520.

(*k*) 2 Saund. 69, a.

(*l*) Rogers *v.* Pitcher, 6 Taunt. 202; Harris *v.* Booker, 4 Bingham, 98; Tidd's Practice, 1036, 9th edition; Taylor *v.* Cole, 3 Term Rep. 295; Bull. Nisi Prius, 104.

(*m*) Doe *v.* Wharton, 8 T. R. 2; Rogers *v.* Pitcher, *supra.*

(*n*) Campbell's case, 1 Roll. Ab. 894, Pl. 5; 2 Leon. 113; Bishop of Bristow's case, Moor, 36.

ditor is satisfied his debt (*p*), or if part has been levied, and the debtor in Court tender him the residue (*q*), he may have his writ of *scire facias ad rehabendum terram*, to ascertain the accidental profit, and for recovery of the land: but in this latter case the tender must be in court, and of the money actually due, and not an offer to come to an agreement: the debtor may also have a *scire facias*, if he has obtained an acquittance; but a *scire facias* will not lie on a general averment that the creditor has received his debt, which may have happened through his improvement of the land, of which the debtor can take no advantage (*r*). If a creditor has two judgments against one debtor (*s*), he may take both moieties in execution; but if one moiety be already taken in execution, a second judgment creditor can take but one-fourth (*t*), that is, a moiety of the remaining moiety, and so of the like.

Copyholds, as already remarked, are not liable to an extent (*u*); nor, it should seem, is an advowson in gross (*v*), nor glebe lands belonging to a parsonage or vicarage (*x*); but rent-charges (*y*), lands whereof a man is seised *jure uxoris* (*z*), lands in ancient demesne (*a*); and, in short, every other species of

(*p*) Bac. Ab. Ex. 707; 2 Inst. 396. (*q*) 2 Roll. Ab. 482.
(*r*) 2 Roll. Ab. 483; Bac. Ab. Execution, 708.
(*s*) Attorney-General *v.* Andrew, Hard. 23.
(*t*) Huyt *v.* Cogan, Cro. Eliz. 482. (*u*) *Supra*, 64.
(*v*) Gilb. Ex. 39; *sed vide* Robinson *v.* Tonge, 3 P. W. 401.
(*x*) Jenk. 207. (*y*) Mo. 32.
(*z*) Dalt. Sher. 136. (*a*) Cox *v.* Barnsley, Hob. 47, 48.

landed property, except as before-mentioned, seem liable to the extent; but if an estate tail be extended, the issue may avoid it, after death of tenant in tail, by assise or writ of *auditâ querelâ* (*e*), and if one of two joint tenants confess a judgment, and die before execution, it will not bind the survivor (*f*).

A judgment is a general lien which will bind lands whereof the debtor is possessed, not only at the time of entering up the judgment, but those also which he shall subsequently acquire, and no subsequent alienation, even to a purchaser without notice, will defeat it (*d*); but such a purchaser may protect himself against prior judgments, of which he had no notice when he purchased, by procuring the conveyance or assignment of a prior outstanding term or legal estate.

A term, in the consideration of law, being but one day, the consequence was, that a purchaser or mortgagee, although prior to the judgment creditor, was bound by the judgment, if the purchase or mortgage and judgment were within the same term; for the judgment would relate to the first day of the term (*e*).

To remedy this, the statute of frauds and perjuries (*f*) enacted, that the judge or officer signing the

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(*b*) Ashburnham *v.* Saint John, Cro. Jac. 85; Gilb. Exec. 391.

(*c*) 1 Inst. 184, b.; Abergavenny's case, 6 Rep. 78.

(*d*) 2 Inst. 395; 1 Roll. Ab. 892, Pl. 14 and 16; 2 P. Wms. 492.

(*e*) 2 Saund. 9.

(*f*) 29 Car. II. cap. 3, sect. 14.

judgment should set down the day of the month and year of his so doing upon the paper book, docket, or record, which he should sign, which date should be also entered on the margin of the roll of the record where the judgment was entered, and that *purchasers* (*g*) should be charged from such time only, and not from the first day of the term, whereof the judgment was entered. By subsequent statutes (*h*), judgments are required to be docketed, viz. those of Michaelmas and Hilary terms, before the last day of the ensuing terms, and those of Easter and Trinity terms, before the last day of Michaelmas term. And it is declared, that no judgment not so docketed, shall affect purchasers or mortgagees (*i*). A docketing after the time limited by the statute will, it seems, be of no avail against any subsequent purchaser or mortgagee, unless he has notice of the judgment, when he will be bound by it in equity, although it is not docketed according to the statute (*k*).

In Hodges *v.* Templar (*l*), Lord Holt said, "If one will enter judgment as of a term, he must actually enter it before the essoign day of the succeeding term, otherwise it shall only relate to the term of which he enters it; and, he adds, if judgment be signed in Hilary term, and in the subsequent vacation the defendant sells lands, and before the essoigns

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(*g*) 29 Car. II. cap. 3, sect. 15.

(*h*) 4 & 5 Will. and Mary, cap. 20; 7 & 8 Will. III. cap. 36.

(*i*) Forshall *v.* Coles, 7 Vin. Ab. 54.

(*k*) Davis *v.* Strathmore, 16 Ves. 419; Thomas *v.* Pledwell, 7 Vin. Ab. 53, *contra*; Forshall *v.* Coles, *supra*.

(*l*) *Supra*.

of Easter term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser, and if one enter judgment in vacation, when indeed the party was dead, yet if he was living in the preceding term, the judgment is good by relation; so that it seems a purchaser might still be over-reached by a judgment signed prior to his purchase, &c., but entered subsequently to it. It is said, however, that no practical inconvenience results from this to purchasers, as it is the practice to index judgments as soon as they are *signed*(*m*).

By the general rules (*n*) made in Hilary term, 4 Will. IV. under the authority of the 3 & 4 Will. IV. cap. 42, sect. 1 (*o*), it is ordered, that all judgments, whether interlocutory or final, shall be entered of the day of the month and year, whether in term or vacation, *when signed*, and shall not have relation to any other day, provided it shall be lawful for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

But, notwithstanding this new regulation, a purchaser might, it is thought, be still over-reached by a judgment signed prior, and entered subsequently to his purchase, if it were not for the precaution of the immediate index. It would seem to be more safe that judgments should take effect from the day they are

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(*m*) *Vide* Sugden's Vendors and Purchasers, 684, 8th edit.; *et vide* Tidd's Pract. 939, 9th edit.; Mayor of Norwich *v.* Berry, 4 Burr. 2277.

(*n*) See 5 Barnewall & Adolphus.

(*o*) 3 & 4 Will. IV. cap. 42.

entered, and that the day of such entry should be entered on the margin of the roll, as directed by the 1 & 2 Will. IV. cap. 58, in respect of the rules and orders to be entered under that act (*p*).

As judgments now take effect from the day they are signed, whether in term or vacation, it is no longer necessary, in order that judgment may be entered up on a warrant of attorney, to show that the debtor was living in the preceding term. It will be sufficient to show he was living within a reasonable time preceding the application (*q*).

By the 1st of Will. IV. cap. 7 (*r*), the judge before whom any action is tried, may certify before the end of the sittings or assizes, that execution ought to issue forthwith, or on some day to be named in such certificate, and subject, or not, to any condition or qualification. And in such case a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms in such certificate, in vacation or term; and the postea, with the certificate, is to be entered of record as of the day on which the judgment shall be signed, and be recorded as the judgment of the Court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof. In the 5th volume of Barnewall and Adolphus will be

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(*p*) Section 7.

(*q*) Jordan *v.* Farr, 2 Adolphus & Ellis, 437.

(*r*) 1 Will. IV. cap. 7.

found an entry of a postea on a judgment signed in vacation (*s*).

Chattels personal and leaseholds, since the statute of frauds, are bound from the time of delivery of the writ of execution into the hands of the sheriff (*t*), and, as between different plaintiffs, the sheriff must give priority to the writ of *fieri facias* first delivered to him, from which time the goods are bound (*u*).

It has been already mentioned, that an equity of redemption is not extendible (*v*). If a judgment be entered up after contract for sale and actual payment of the purchase-money, but previously to the conveyance, the purchaser will, it seems, be relieved against it in equity (*x*). If a mortgagee in fee purchase, he will, of course, be protected from all judgments subsequently to his mortgage, of which he had not notice (*y*).

A difference of opinion formerly prevailed (*z*), whether in equity, judgments bound a subsequent purchaser or mortgagee *who had notice of them*, but who,

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(*s*) Engleheart *v.* Eyre, 5 Barnewall & Adolphus, 70.

(*t*) 29 Car. II., cap. 3, sect. 16.; Burdon *v.* Kennedy, *supra*, 739; Jeanes *v.* Wilkins, 1 Ves. 195.

(*u*) Hutchinson *v.* Johnson, 1 Term Rep. 729.

(*v*) *Ante*, page 55.

(*x*) Finch *v.* Earl of Winchelsea, 1 Pr. Wms. 277.

(*y*) Sugden's V. and P. 478, 8th edit.

(*z*) See Powell on Mortgages, 4th edit. 508; Sugden's V. and P. 476, 8th edit.

previously to execution sued out, obtained a conveyance from trustees, in whom the lands had been vested prior to the obtaining of the judgments. By the express words of the statute, which directs that execution may be delivered of all such lands as any other persons shall be seised of, in trust for the debtor, in the same manner as if he had been seised of such lands of such estate, as they shall be seised of in trust for him at the time of the *execution sued*, and by the authority of the case of Hunt *v.* Coles (*a*), it would seem clear, that *at law* the lands are not liable. But it was urged that they were liable *in equity* if the purchaser, &c. had *notice;* and in behalf of this opinion it was argued (*b*), the lands would have been so liable prior to the statute of frauds, and it could not be supposed the statute intended to conclude the equitable relief. In support of this opinion, the cases of equitable relief under the registry acts were referred to. On the other side, the argument was that as equity follows the law (*c*), no relief would be granted against the purchaser, through the medium of a Court of Equity.

The precise point has recently occurred, and it has been decided, that notice to the subsequent purchaser is binding, even although the judgment (so far as it affects lands in a registry county) is not registered (*d*).

(*a*) Hunt *v.* Coles, Com. 226 ; *et vide* Com. Dig. Title Execution, (C. 14.) and 2 Saund. 11.

(*b*) Sugden's V. and P. 480, 8th edit.

(*c*) Higgins *v.* The York Buildings Company, 2 Atk. 107.

(*d*) Tunstall v. Trappes, 3 Sim. 286.

If, however, the conveyance to the purchaser be in exercise of a power created by an instrument dated prior to the judgment, then, as the exercise of the power wholly displaces the estate in respect of which the judgment is obtained, the judgment will be defeated at law(*e*), and also in equity, even although with notice(*f*).

If a trust for sale is once well created, the existence of subsequent judgments against the grantor will not prejudice the title (*g*).

A Court of Equity will not oblige a creditor to wait until he is paid out of the rents, but will accelerate the payment by a sale of the moiety (*h*).

If the inquisition by the sheriff be void for any defect appearing on the face of it, the Court will, on suggestion thereof, or on a writ of *scire facias*, order the writ to be vacated, and award a new one and amerce the sheriff(*i*).

If the debtor be possessed of a term for years, the sheriff may either extend it, that is, deliver a moiety of it to the creditor, or he may sell the whole term to the creditor, as part of the personal estate of his

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(*e*) Doe *v.* Jones, 10 Barnewall & Cresswell, 459.

(*f*) Tunstall *v.* Trappes, *supra*; Eaton *v.* Sanxter, heard in March, 1834, before the V. C.

(*g*) Lodge *v.* Lyseley, 4 Simons, 70.

(*h*) Stileman *v.* Ashdown, 2 Atk. 610.

(*i*) 2 Saund. 69, *note*.

debtor, at a gross price, appraised and settled by the jury(*j*). The debtor may save the term by tender to the sheriff prior to its delivery to the creditor, or by tender in Court before actual delivery by the sheriff; but if no such tender is made, the property is altered by the delivery of the sheriff, and the creditor may dispose of it without being accountable for the profits(*k*). If, however, the judgment be afterwards reversed, the sale and delivery will be void, and a writ of restitution awarded. But if the term had been sold under a *fieri facias*, and the judgment had been reversed, the sale would have been valid(*l*).

If the sheriff legally take goods in execution, and the owner afterwards becomes bankrupt, and the sheriff, after the bankruptcy, sells at one time goods sufficient to satisfy that execution, and also an execution delivered to him after the bankruptcy, the assignees may maintain *trover* against the sheriff for such of the goods as were sold after he had raised money sufficient to satisfy the first execution (*m*).

After the sheriff has delivered the lands to the creditor under an elegit, the latter cannot have either a *fieri facias* or *capias ad satisfaciendum* (*n*). But if

(*j*) 2 Inst. 395; Fleetwood's case, 8 Rep. 171, a; Dalt. Sher. 137.

(*k*) Gilb. Ex. 34; 2 Saund. Rep. 68; Comyn *v.* Brandlyn, Mo. 873.

(*l*) Goodyere *v.* Ince, Cro. Jac. 246; Bac. Ab. Ex. 740.

(*m*) Stead and others, assignees of Moorhouse *v.* Gascoyne, 8 Taunton, 527.

(*n*) Tidd's Pract. 996, 9th edit.

the sheriff return *nihil* to the elegit, or if nothing be done on the writ, the creditor may sue out a *capias ad satisfaciendum* or *fieri facias*, or may have debt on the judgment (*o*). And after a *fieri facias*, the creditor may have either a *capias* or elegit (*p*). If the creditor be evicted out of the extended lands, he may have a *scire facias* out of the Court from which the first execution issued, on which a new writ may issue (*q*). And the remedy extends to his personal representatives (*r*). Or if the record is removed on error into another Court and affirmed there, he may also have a *scire facias* out of that Court. But to give him the benefit of the statute, he must be evicted from all the lands, and not from part only (*s*).

Although the creditor under the elegit holds the lands "*as his freehold*," yet he has a chattel interest only, which devolves on his personal representatives (*t*).

It is a general rule, that execution cannot be sued out after a year and a day, without a writ of *scire facias;* but if a writ has issued, and been returned and filed, it may be continued by entry on the roll of *vicecomes non misit breve*. It seems (*u*), the mere awarding of a writ of elegit on the roll within the year, will not warrant the entry of the con-

(*o*) Tidd's Pract. 1037, 9th edit. (*p*) Ibid. 1019.
(*q*) 32 Hen. VIII. c. 5. (*r*) Co. Litt. 290, a.
(*s*) Co. Litt. 289, b.; Fulwood's case, *supra*; Crawley *v.* Lidgeat, Cro. Jac. 338.
(*t*) 1 Inst. 42, a; 2 Inst. 396, a.
(*u*) Tidd's Pract. 1104, 9th edit.

tinuances. The debtor may by agreement waive the benefit of requiring a writ of *scire facias*, to revive the judgment, as is the usual practice on warrants of attorney; and if a writ of execution has been issued within the year, a different writ of execution may be awarded after the year, without a *scire facias* (*x*). If the executor or administrator of the creditor proceed on the judgment, they must sue out a *scire facias*, even within the year (*y*). The creditor may award on the roll several writs of elegit into several counties for the whole debt (*z*). The proper mode of discharging a judgment is by entering up satisfaction on the record (*a*), or the judgment may be released by deed, which, although it does not vacate the judgment, will be good cause, in case execution is sued out, on which to ground a writ of *auditâ querelâ*, to annul the execution (*b*); and it was held, that after a considerable lapse of time, the Courts would presume the judgment satisfied (*c*); and it seems the defendant might, on an old judgment, plead payment under the 4th of Anne, cap. 16, sect. 12 (*d*).

The 3 & 4 Will. IV., cap. 27 (*e*), has now enacted,

(*x*) Ares *v.* Hardress, 1 Stra. 100. (*y*) 2 Inst. 395.

(*z*) Dyer, 162, (b), Pl. 51; Earl of Worcester's case, Moor, 24, Pl. 83; Goodyere *v.* Ince, *supra*; Yelv. 179; 2 Saund. 68, a.

(*a*) For the mode of doing this, see Tidd's Pract. 1096.

(*b*) Bac. Ab. Ex. 707.

(*c*) Peake's Evidence, 25, note; Tidd's Pract.

(*d*) Kemys *v.* Ruscomb, 2 Atk. 45.

(*e*) 3 & 4 Will. IV. c. 27, s. 40.

that no action or suit shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged or chargeable out of any land at law or in equity, or any legacy, but within twenty years after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, unless in the mean time some part of the principal money, or some interest thereon, shall be paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent. And in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Recognizances are of two sorts; viz. recognizances by the common law, and recognizances by the statute law. Of the latter we shall speak presently. Recognizances by the common law are obligations acknowledged by the debtor before any of the judges in or out of term, and in any part of England, or before the Lord Chancellor or any other person for such purpose appointed by the king, or, by the custom of London, before the lord mayor and aldermen, or lord mayor singly, and perfected by enrolment in some court of record (*e*), and on which execution may be sued out, in like manner as on a judgment. If execution is not sued out within a year and a day

(*e*) Bacon's Ab. Execution, 687.

after the day assigned in the recognizance, a writ of *scire facias* must issue to revive the judgment (*f*); recognizances must, it seems, be enrolled within six months after being acknowledged (*g*), and they bind lands in the hands of a purchaser, from the time of enrolment (*h*).

The statute of Acton Burnell, as before mentioned (*i*), created the *statute merchant*. This statute was partial in its operation, and the sheriffs, it is said, misinterpreted its provisions, and sometimes, by malice and false interpretation, delayed its execution; the statute of the 13 Edw. I., stat. 3 (*k*), therefore, at once enforced and extended the remedy by enacting, that a merchant who would be sure of his debt, should cause his debtor to come before the mayor of London, or before some chief warden of a city, or of another good town where the king should appoint: and, that he should, before the mayor and chief warden or other sufficient men chosen and sworn thereto, when the mayor or chief warden could not attend, and before one of the clerks that the king should thereto assign, when both could not attend, *acknowledge the debt and the day of payment*, and the recognizance should be enrolled by one of the clerks, and the roll should be double, whereof one part should remain with the mayor or chief warden, and the other with the clerks that thereto should

(*f*) Bacon's Ab. Ex. 693.
(*h*) Ibid.
(*k*) 13 Edw. I., stat. 3.
(*g*) 2 Saund. 8.
(*i*) *Supra*, page 67.

be first named; and further, *one of the said clerks*, with his own hand, *should write an obligation*, to which writing *the seal of the debtor* should be put, *with the king's seal* provided for the same intent, which seal should be of two pieces, whereof the greater piece should remain in the custody of the mayor or chief warden, and the other piece in the keeping of the aforesaid clerk, and if the debtor did not pay at the day limited to him, then should the merchant come to the mayor and clerk with his obligation, and if it were found by the roll or writing, that the debt was acknowledged and the day of payment expired, the mayor or chief warden should cause the body of the debtor to be taken (if he were lay) whensoever he happened to come in their power, and should commit him to the prison of the town, there to remain until he agreed for the debt; and if the debtor was not in the power of the mayor or chief warden, then the mayor or chief warden should send the recognizance *into Chancery under the king's seal*, and the Chancellor should direct a writ unto the sheriff, in whose shire the debtor should be found, to *take his body* (if he were lay) *and safely keep him in prison* until he had agreed for the debt; and, within a quarter of a year after he was taken, his chattels should be delivered to him, so that by his own he might levy and pay the debt; and it should be lawful unto him, during the same quarter, to sell his lands and tenements for the discharge of his debts, and his sale should be good and effectual; and, if he did not agree within the quarter next after the quarter expired, *all the lands and goods of the*

debtor should be delivered unto the merchant by *a reasonable extent*, to hold them until such time as the debt was wholly levied, and *nevertheless the body should remain in prison*, as before said; and the merchant should have such seisin in the lands delivered to him, that he might have a writ of novel disseisin and redisseisin, *as of freehold*, to hold to him and his assigns until the debt was paid; and, as soon as the debt was levied, the body of the debtor should be delivered with his lands, and the sheriff should return the writ; and if the sheriff return that, the debtor could not be found, or that he was a clerk, then the merchant should have writs to all the sheriffs where he had lands, to deliver to him all the goods and lands of the debtor, at a reasonable extent, to hold unto him and his assigns in form aforesaid, and at last he might have a writ to take his body, if he were lay; and, after the lands were delivered to the merchant, the debtor might lawfully sell them, so that the merchant had no damage, and the *merchant should be always allowed for his damages, costs, labours, suits, delays, and expenses*, and if the debtor found sureties, they should be liable in like manner; and the merchant should have seisin of all the lands that were in the hands of the debtor the day of the recognizance made, in whose hands soever they came after, either by feoffment or otherwise; and that if the debtor or his sureties died, the creditor might take the lands, but *not the body of the heir*.

A statute merchant, then, is a bond of record under the hand and seal of the debtor, authenticated

by the king's seal, which renders it of so high a nature, that, on failure of payment on the day assigned, execution may be awarded, without any mesne process to summon the debtor, or the trouble or charges of bringing in proofs to convict him, and thus, it is presumed, it obtained the name of *a pocket judgment* (*l*).

The provisions of the act must be strictly attended to, for if the statute merchant varies from them in a material part, it will be void, and the party may be relieved in a writ of *auditâ querelâ* (*m*); but although void as a statute, it may be still good as an obligation, being under the seal of the debtor (*n*); but the omission of an immaterial circumstance will not vitiate it, such as the omission of the day of payment, for then it shall be paid presently (*o*), or if the inrolment, &c. be written by the servant of the clerk, and not by the clerk himself (*p*), or the like.

The next remedy for the creditor was the *statute staple* (*q*). It was deemed advisable that certain towns should be appointed at which the staple of wool, leather, fells and lead should be holden, for the purpose of exportation by foreign merchants, and for that purpose the statute of the 27 Edw. III. st. 2, was passed, called the "Statute of Staples," which made it felony for any English merchant to export

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(*l*) Bac. Ab. Execution, 689. (*m*) 2 Saund. 69 a, *note*.
(*n*) Hollingworth *v.* Ascue, Cro. Eliz. 355, 494.
(*o*) Sir William Jones, 52 Bridg. 19; Winch. 82.
(*p*) Winch. 83. (*q*) 27 Edw. III. st. 2.

the staple commodities of the realm; and, for the protection of the foreign merchant, it created the statute staple, that is, it authorized the *mayor of the staple* to take recognizances of debts made before him in *the presence* of the *constables* of the staple, or one of them, and *each staple* should have *a seal kept in the possession of the mayor under the seal of the constables*, and that *each obligation* made on such recognizances should be sealed *with the seal of the staple*, and the mayor might take the body of the debtor and commit him to prison, if found within the staple, until he made agreement for the debt and damages, and seize the goods of the debtor within the staple, and deliver them to the creditor on a true appraisement, or sell them and deliver the money to the creditor; and if the debtor was not within the staple, nor goods to the amount of the debt, the same should be certified into Chancery, under the seal of the staple, on which a writ should issue to *take the body of the debtor and his lands, tenements and goods*, and the writ should be returned with the value of the lands and goods, and due execution should be made from day to day, in like manner as in the case of a statute merchant.

A statute staple, then, is a bond of record acknowledged before the mayor of the staple in the presence of the constables of the staple, or one of them, and the only seal required for its validity is the seal of the staple, and therefore if the statute be void for any cause, it cannot, as in the case of a statute merchant, be proceeded on as a common

obligation (*r*), and, wanting the sanction of the seal of the king, the sheriff, after the extent, cannot deliver the lands to the conusee, but must seize them into the king's hands, and in order to obtain possession of them the conusee must sue out a writ of *liberate* (*s*), which is a writ out of Chancery, reciting the former writ, and commanding the sheriff to deliver to the conusee all the lands, tenements, and chattels by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he be satisfied his debt (*t*).

The intent of the statute of 27 Edw. III. was to confine the remedy thereby given to transactions between merchant and merchant, concerning the merchandize of the same staple (*u*), but the remedy being found convenient, it was, by connivance, extended to cases not within the meaning of the law. To suppress this, and, at the same time, to give the creditor a security of a similar nature, the statute of the 23 Hen. VIII. c. 6, authorized the *recognizance in the nature of a statute staple.* It prohibited the improper use of the statute staple, properly so called, but enabled the *Chief Justice of the King's Bench or Common Pleas,* and, *in their absence,* out of term, the *Mayor of the Staple of Westminster and the Recorder of London jointly* to take recognizances, and it prescribed the form of the recognizance, and that

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(*r*) Bro. Stat. Merchant, 16; Mo. Pl. 1097; Ascue *v.* Hollingworth, *supra*; 2 Bac. Ab. 693.

(*s*) 2 Roll. Ab. 475. (*t*) 2 Saund. 70, c.

(*u*) *Vide* Preamble to Statute 23 Hen. VIII. c. 6.

it should be sealed *with the seal of the debtor and of the king*, and *of the judge or persons before whom it was taken*, and should be enrolled in two rolls by the clerk of the recognizances, and one of the rolls should be kept by the justices, &c. and the other by the clerk, and should, at the request of the creditor, be certified into Chancery under the seal of the clerk, and the creditor should have the like process and remedy as in the case of *a statute staple.*

A recognizance, then, within the act of the 23 Hen. VIII. is in effect the same as the statute staple under the 27 Edw. III. except that it is acknowledged before different persons, and being under the seal of the debtor, it may, as well as the statute merchant, be used as a common obligation (*x*).

The process on a statute merchant differs from that on the statute staple, and the recognizance in nature of a statute staple in some important particulars. For if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, under the two latter securities, after the certificate under the seal into Chancery, is to take body, lands, and goods all in one writ, in which respect it is preferable to the statute merchant, under which, after it is certified into Chancery, the first process is a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the defendant, if a layman, to satisfy the

(*x*) Saund. 70, b.; Bothomly v. Fairfax, 1 P. W. 335.

debt (*y*). If the sheriff return upon the writ, that the party is dead, or not found in his bailiwick, the writ issues to extend the land (*z*). If the conusor be a clergyman, he cannot be arrested under the statute merchant, but the sheriff is in the first instance commanded to levy the debt of his moveable goods and chattels, by writ of *levari facias* (*a*).

These securities also differ in respect of the place of the return; for the writ of execution on the statute merchant is returnable in either bench, but upon the statute staple, the writ is returnable into Chancery (*b*): and the 23 Hen. VIII. c. 6, which first brought in the recognizance in nature of a statute staple, referring in this to the same process and execution established by 27 Edw. III. st. 2, c. 9, on the staple, the law must be the same in both cases (*c*).

The writ of execution on a statute or recognizance, is a writ of extent or *extendi facias* against the body, lands, and goods of the debtor (*d*), under which the sheriff must impannel a jury to extend the lands, as upon an elegit (*e*).

The conusee has this advantage over the judgment creditor, viz. he may issue out execution *at any time*, without a *scire facias*, or if the conusee die,

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(*y*) Saund 70, c.
(*z*) Ibid.
(*a*) Ibid.
(*b*) 2 Bac. Ab. 692.
(*c*) Co. Litt. 290; 2 Bac. Ab. 692.
(*d*) Tidd's Pract. 1031; 6th edit.
(*e*) 19 Vin. Ab. 557.

his executor may sue out execution in like manner, and if the conusor be returned dead by the sheriff, the execution may, it seems, be taken out against his lands, without a *scire facias*, against his heir, or against the heir and terre tenants at the conusee's election (*f*); but, until actual entry, although after *liberate* returned, he has not an assignable interest (*g*), but only a possession in law, which he must perfect by entry, and a release by the conusee before execution of all his right and interest *in the land*, will not estop his subsequent execution (*h*), but, nevertheless, he may by proper words release *the execution* (*i*); legal possession of the land must, it seems, be obtained by ejectment (*k*).

Although the conusee may extend all the lands of the conusor, into whose hands soever they come (*l*), yet, so long as they remain in the possession of the conusor or his heirs, the conusee may, if he so think fit, extend a part only (*m*); but if the conusor has aliened the whole or part since the statute or recognizances, the case is altered; for if he has parted with the whole to different persons, and the conusee extend part only, the aggrieved party may compel

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(*f*) 2 Inst. 471; Bro. Statute Merchant, 16, 43, 50; Bac. Ab. Execution, 694; *Scire facias*, 108; 2 Saund. 72, note.

(*g*) Hanman *v.* Woodford, 4 Mod. 48; 2 Salk. 563; 3 Lev. 312; Barrow *v.* Gray, Cro. Eliz. 552.

(*h*) Barrow *v.* Gray, *supra*.

(*i*) Bac. Ab. Exec.; Hyde *v.* Morley, Cro. Eliz. 40.

(*k*) 1 Vent. 41, 42. *Sed vide supra*, page 66.

(*l*) Harbert's case, 3 Co. 12; (*m*) Bac. Ab. Exec. 698.

all the alienees to contribute, by writ of *auditâ querelâ* (*n*), which sets aside the execution, and restores the party to the mesne profits, and compels the conusee to sue execution of all the lands (*o*). If the conusor has aliened part only of his lands, and the conusee extend all or part of the land sold, the party aggrieved shall also in such case have his writ of *auditâ querelâ* (*p*); but if the conusee had, in such instance, extended the lands only which remained in the hands of the conusor or his heirs, no writ of *auditâ querelâ* would lie, for neither he nor his heir could have contribution against his alienees (*q*). But as between co-heirs it is but fair they should contribute, a writ of *auditâ querelâ* for contribution will therefore lie (*r*).

The lands taken under a statute or recognizance, will, as in the case of an elegit, descend on the personal representatives of the conusee as chattel interests (*s*), and they are to be holden until the conusee has received his debt, and costs of suit and reasonable expenses, which the Chancellor shall assess, and, therefore, although the time of the statute is expired, the conusor is put to his *scire facias* before he can regain possession of his lands (*t*), in which respect these securities differ from an elegit, as already mentioned (*u*).

(*n*) Bro. Stat. Mer. 49; 2 Inst. 396.
(*o*) Bac. Ab. Exec. 696. (*p*) 1 Roll. Ab. 311.
(*q*) Harbert's case, *supra*; 2 Roll. Ab. 472.
(*r*) Hob. 25; Co. Lit. 376. (*s*) 1 Inst. 42, a; 2 Inst. 396.
(*t*) 4 Co. 67; 2 Roll. Ab. 479. (*u*) *Supra*, p. 65.

Lands purchased subsequently to the acknowledgment of the statute or recognizance, will, as in the case of a judgment, be bound by the lien (*x*), and as the statute was created for the benefit of merchandize, an alien merchant may, under a statute, extend the lands and hold them against the king (*y*).

The statute may be discharged before execution by cancelling, or by a defeazance or release, after which, if the conusee proceed to take out judgment, the conusor may sue out his writ of *auditâ querelâ* to set aside the execution. The statute is also discharged, if the conusee purchase part of the land in execution (*z*).

In case of eviction, the conusee may have a writ *scire facias*, and a new writ of execution, and in case of omission or error in the inquisition, he may have a writ of re-extent (*a*).

After the debt and costs are satisfied, the proper discharge is the entry of satisfaction on the record.

Several statutes have been enacted for the regulation and enrolment of statutes and recognizances. The statute of the 27 Eliz. c. 4 (*b*), has declared that the whole tenor and contents of all statutes merchant and statutes staple shall, within six months

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(*x*) Bac. Ab. Exec. 698. (*y*) Bac. Ab. Aliens, 138.

(*z*) Ibid. Exec. 704, 705.

(*a*) 1 Inst. 290, 32 Henry VIII. c. 5; 8 Geo. I. c. 25, sect. 4; *vide infra*.

(*b*) 27 Eliz. c. 4, sects. 7 & 8.

after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 Henry VIII. c. 6, who shall enter the same in a book provided for that purpose, and kept by him; and if they are not brought within four months after they are acknowledged to the clerk for the purpose of being so entered, the statutes shall be void against subsequent purchasers for money or other good consideration. It will be observed, that this statute does not extend to recognizances in the nature of a statute staple.

By the statute of frauds (*c*) it is provided, "that the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll where the recognizances are enrolled, and that no recognizance shall bind any land, tenements or hereditaments in the hands of any purchaser, *bonâ fide* and for valuable consideration, but from the time of such enrolment." And by a subsequent statute (*d*) it is enacted, "that the clerk of the recognizances in the nature of a statute staple, or his deputy, shall yearly from thenceforth prepare and keep three parchment rolls, as usual, and shall, at the times of acknowledging of every such recognizance, fairly write or ingross, instead of the heads or contents thereof, on the said rolls, the full tenor *in hæc verba* of every such recognizance, and that one of the said rolls shall contain all the recognizances to be taken before the Chief Justice of the King's Bench for

(*c*) 29 Car. II. c. 3, sec. 18. (*d*) 8 Geo. I. cap. 25.

the time being, and one other of them shall contain all the recognizances to be taken before the Chief Justice of the Court of Common Pleas for the time being, and the other of them shall contain all the recognizances before the mayor of the staple at Westminster, and recorder of London, for the time being; and that, at the time of every such acknowledgment, the respective persons before whom such recognizances shall be taken, and also the party and parties acknowledging the same, shall also sign their respective names to the roll or inrolment of every recognizance so taken, under the inrolment thereof, as well as sign and seal the same recognizance; and that all the said three rolls so signed shall, at the end of every year, be fixed together, and be thereby made one roll as accustomed, and be and remain in the custody of the clerk of the recognizances, or his deputy, in his public office in London or Middlesex, who shall keep a docket to refer to the said roll or rolls, for the benefit of searches by purchasers and others (as used to be), to which docket also shall be added the day, month and year of every such acknowledgment; and that in case any loss or damage shall happen to any such recognizance, the same shall and may, from any of the said rolls so to be kept in the custody of the said clerk or his deputy, in order to have process thereon, be by him or them, by certificate under his or their seal, certified into Chancery, in like manner as recognizances by the said act of the 23 Henry VIII. are directed, and as if the said recognizance had not been lost or damaged; and that to such certificate and all other certificates of such recognizances shall be annexed a true transcript

of the entry of such recognizance, to be taken from the said roll or rolls in his or their custody; and further, that in case of any such loss or damage, a like certificate, with such transcript annexed as aforesaid, shall be made, and be left and remain with the clerk of the Petty Bag Office in Chancery, and shall be as good and effectual as if the said recognizance under seal had been left in the same office, as hath been used upon the issuing out of process in the same office; and that in order to prove such statutes and recognizances, in case of any loss or damage, a true copy or copies from the said roll or rolls, in the custody of the said clerk or his deputy, made and signed by the said clerk or his deputy, and duly proved, shall be deemed good evidence of such recognizances, and be of the same validity to all intents and purposes, as if the said original recognizances were produced under seal; and that in case it shall at any time or times before or after the filing or returning of any liberate or liberates, sued out on any such extent or extents, be made appear to the Court of Chancery that sufficient has not been extended and levied, or sufficiently extended and levied to satisfy such recognizance, or that any omission, error or mistake has happened in making, suing out, executing or returning any of the said writs, or any process thereupon, or should it happen that any lands, tenements or hereditaments should thereafter be evicted from any person or persons who shall have extended the same by virtue of any such writ or process as aforesaid, that then, and in every such case, the said Court of Chancery shall and may award one or more re-extent or re-extents for the

satisfying the same as aforesaid; and that writs of liberate or liberates may be sued out thereupon, any law or statute to the contrary thereof in any wise notwithstanding."

By the several registry acts(*e*), it is provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of his Majesty) shall affect or bind any manors, lands, tenements or hereditaments in the counties of Middlesex and York, unless a memorandum of such judgment, statute or recognizance shall be entered at the register office, in manner therein directed. In Middlesex, judgments, &c., bind from the time they are memorialized. In the North Riding of York, any judgment registered within twenty days; and in the East and West Ridings, and in Kingston-upon-Hull, within thirty days after the day of acknowledgment, is available in like manner as if registered on the day it was acknowledged (*f*).

The process against the ecclesiastical profits of a beneficed clerk, is termed a *sequestration*. When a writ of execution is sued out against a beneficed clerk, if the sheriff return *nulla bona*, and that the defendant has no lay fee, a writ of *fieri* or *levari facias* issues to the bishop of the diocese wherein the benefice is, commanding him to levy the sum recovered of the ecclesiastical goods and chattels of the defendant.

(*e*) 5 Ann. c. 18; 6 Ann. c. 35; 7 Ann. c. 20; 8 Geo. II. c. 6.

(*f*) *Et vide* Sugden's V. and P. page 485, 8th edit.

This writ is in the nature of a common *fieri facias*, and the bishop may seize and sell the profits of the benefice. Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or (upon a proper security) to persons of the plaintiff's own appointment, requiring them to sequester the tithes and other profits of the benefice, which sequestration is to be forthwith published by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon, for, until publication, it has no priority over other sequestrations. This writ is a continuing writ, and the plaintiff is entitled to the growing profits from time to time, though the writ has long been returnable; but if it be actually returned, the bishop's authority is at an end. The proper return to the bishop is *fieri* or *levari feci* (*g*).

It may be proper in this place to add a few words concerning debts due to the king.

Debts to the king are either of record or not of record.

Debts of record to the king are in the nature of a feudal charge, and bind the debtor's land in whose hands soever they come, from the time of his becoming in debt to the king (*h*). And the crown, by its prerogative, has preference in all cases in

(*g*) Tidd's Pract. 9th edit.
(*h*) 2 Roll. Ab. 156, (b) Pl. 1.

which the debt is prior on record to the judgment, statute or recognizance of the subject, even although the lands have been actually delivered to the subject under the elegit or extent (*i*). If the judgment, statute or recognizance of the subject be prior in date to the king's debt of record, yet, to give the subject priority, the lands must be actually delivered to him in satisfaction of his debt, for if the king's writ comes into the sheriff's hands whilst the lands are in the possession of the law, on the elegit or extent, and not actually delivered to the creditor, the alteration of property is not complete, and the king's debt shall be first satisfied (*k*).

By the common law, the king could only take by matter of record, and, therefore, although by force of the prerogative of the crown, it was an incontrovertible rule, that in all cases where the king's and subject's titles concurred, the king's title should be preferred (*l*); yet, on all bond and simple contract debts due to the king, before an extent could issue, it was necessary the debt should be found by inquisition, after which it became a debt of record. To remedy this delay, so far as respected bond debts, the 33 Hen. VIII. c. 39, sec. 50, enacted, that all obligations and specialties which should be made for any cause or causes touching or in any wise concerning the king's most royal majesty, or his heirs,

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(*i*) Bac. Ab. Execution, 735; 2 Saund. 70, (e); Gilb. Hist. Exch. 88.

(*k*) Gilb. Exch. 91. (*l*) 16 East, 282.

or to his or their use, commodity, or behoof, should be made to his highness and his heirs, kings, in his or their name or names, by the words " to the lord the king," and to none other person or persons, to his use, and to be paid to his highness by these words " to be paid to the said lord the king, his heirs or executors," with other words used and accustomed in common obligations; and that all such obligations and specialties so to be made, should be good and effectual in the law to all purposes and intents, and shall be of the same nature, kind, quality, force and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the *statute of the staple at Westminster*, had at any time theretofore been taken, used, exercised and executed against any lay person or persons. And the 53d section enacted, that all suits, process, judgments, decrees and executions thereafter to be taken, pursued or given for the king, in any of the king's Courts mentioned in that act, of or upon any of the same obligations, should be of the same or like strength, force, effect and intent in the law to all purposes, only against all and all manner of such person or persons as had been bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the *statute of the staple at Westminster*, at any time before the making of that act had been used to be taken, exercised and executed against any lay person or persons; and by the 74th section it was further enacted, that if *any suit* should be

commenced or taken, or any process be awarded for the king for the recovery of any of his debts, then the same suit or process should be preferred before the suit of any person or persons; and that the king, his heirs and successors, should have first execution against any defendant or defendants of and for his said debts, before any other person or persons, *so always that the king's suit were taken and commenced, or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons.*

By force of the 50th and 53d sections of this sta tute, the king became enabled to proceed to execution on a bond executed to him, without a previous inquisition, and thus far the prerogative of the crown was *enlarged.*

On the intent of the 74th section, a great difference of opinion has prevailed. It was admitted not to be confined to bond debts (*m*), and that it was restrictive on the old prerogative; but to what extent was the doubt. A question was also raised, whether it was to be held as extending to goods as well as lands. In an early case (*n*) it was considered that the ita quod, *so always,* made a condition precedent and a limitation, and it was decided, that a judgment and execution, *executed by elegit* before any suit or process commenced by the king, should be preferred to the extent of the king, issuing on a bond

(*m*) Cecil's case, 7 Rep. 18.

(*n*) Attorney-General *v.* Andrew, Hard. 23.

debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. It does not appear what would have been the decision of the Court if the elegit had not been executed. In Uppom *v.* Sumner (*o*), decided in the Common Pleas, after much consideration, the judges of that Court unanimously decided, that the crown's extent came too late, after the defendant's *goods* were seized, in execution on a judgment at the suit of a subject, *but before sale.* In Rorke *v.* Dayrell(*p*), the like point was unanimously decided by the judges of the King's Bench, although it was ably argued, that if the case of Uppom *v.* Sumner was law, the crown, so far from being in a better, was in a worse situation than the subject, which might be exemplified thus:—" It was clear the king was not bound by the statute of frauds, by which it was enacted, that no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff, and, therefore, with respect to the king, the common law still operated to bind the goods from the teste of the writ (*q*). Now if A. recover judgment against the king's debtor on the 1st of January, but do not deliver his writ of execution to the sheriff till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issue at the suit of the crown, according to the construction contended for, this absurdity would

(*o*) Uppom *v.* Sumner, 2 Black. Rep. 1251, 1294; 4 Term. Rep. 413. *Et vide* 2 Com. Dig. 538, 648.

(*p*) Rorke *v.* Dayrell, 4 T. R. 402. (*q*) Gilb. Exch. 90.

follow, that the king would not be preferred as against A., though he would as against B.; and yet it must be admitted, that B. is entitled to a preference against A."

The point afterwards came on to be argued in the Court of Exchequer (*r*), and was decided in favour of the crown. The Lord Chief Baron (Macdonald), in the course of his judgment, took an original view of the matter. His Lordship said, " his apprehension was, that when the cases of Uppom *v.* Sumner, and Rorke *v.* Dayrell were determined, it was not sufficiently considered how the law stood with respect to the prerogative of the crown, both in respect of the general preference which it claims to be entitled to for all its rights, and as to the particular prerogative in respect of execution for its debts. By the common law, the crown was entitled to *prior execution* for its debts; this does not mean preference as between two executions sued out, the one by the crown, the other by the subject; but the crown was to be first satisfied its debt, before the subject could *take out any execution at all.* The crown protected its debtor against all executions by the subject, till the crown's debt was paid. We have a writ of protection in the register, and Fitz. Nat. Brev. 28, B.; and notice is taken of this prerogative in Cr. Ly. and Madox; and this explains one of the cases cited in the King *v.* Cotton (*s*), where the king sent his writ out of Chancery to the justices of the C. B. com-

(*r*) Rex *v.* Allnutt, 16 East. 278.
(*s*) King v. Cotton, Parker, 123.

manding them to surcease execution in a suit between subject and subject, the defendant being his debtor, till the debt should be satisfied: which was considered as so much of course, that the plaintiff asked no more of the Court, than that the cause should be left on foot in Court by continuance on the roll, in order that when the king's debt should be satisfied, there should be an award of execution for him. Whether it may not be too critical to say, that there is a legal distinction between prior execution and preference in execution, I am not quite sure; the language of 33 Hen. VIII. is, that the king's suit and process shall be preferred before the suit of any person, and that he shall have first execution. It is not that his execution shall be preferred, but that he shall have first execution, that is, he shall have execution before the subject shall be permitted to have his execution, which seems to have a pretty plain reference to this prerogative, which went to restrain the subject from taking any execution at all, till the crown's debt was satisfied. This prerogative was carried so high formerly, that an executor of one indebted to the king could not take probate, till the king's debt was paid or secured to him. Instances are vouched by Madox and the records of this Court, of Licences, stating the prerogative, and stating that the king's debt had been in some manner compounded for or secured. At this day, in the case of an execution, the king's suit and process is preferred, and he is entitled to prior execution in respect of all his debts upon record. The *diem clausit extremum* issues without waiting for an executor or administrator; and when there is an

executor or administrator, in the administration of assets, it would be a *devastavit* in him, if he were to pay the debt of the subject before the crown's debt upon record. But it has been held, that since 33 Henry VIII. there is the single case of execution upon a judgment, which they say is to be preferred to the king's debt by force of the statute. This appears to me to go a great way to shew what prerogative of the crown it was to which the statute applies; that it was to the prerogative of having first execution in the sense in which I have explained the words, and not to any prerogative which goes to determine the preference between two executions, one of the crown and the other of the subject, *subsisting* at the same time. This latter prerogative will be found to depend upon another principle perfectly distinct from this, and far more general; determining a preference in favour of the crown in all cases, and touching all rights of what kind soever, where the crown's and the subject's right concur, and so come into competition. I take it to be an incontrovertible rule of law, that where the king's and the subject's title concur, the king's shall be preferred. The books are full of instances to that effect. A great number are cited in the Attorney-General *v.* Andrew, Hard. 24, and among these Stringfellow's case (*t*), which is the case of an execution; but there is a multitude of other cases which have nothing to do with executions. If 33 Hen. VIII. had meant to have taken away or abridged this prerogative, it can hardly be imagined, that it would

(*t*) Stringfellow's case, Dyer, 67.

have controlled the effect of it in the particular instance of an execution, and left it to operate in its full force in the multitude of other cases to which it applies. That in the case of two executions subsisting at the same time, the crown's and the subject's title do concur, and that this is a different case from the case of a first execution, which supposes that to exist before the other, appears to be manifest; each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some one point of time before either is executed; the instant they thus concur, the king's prerogative to be preferred attaches. Stringfellow's case proves, that priority of teste and even part execution avail nothing; an imperfect and even barely inchoate title gives way to a title of the same nature in the crown whenever they are found to exist together. An execution executed by the subject alters the property, and there is then nothing left upon which the crown's execution can attach; in that case the crown's and the subject's title do not concur; but in the expressive language of Steel, C. B. in the Attorney-General *v.* Andrew, the subject's title is prior to the king's, and is executed. I observe that in the case of Rorke *v.* Dayrell, it seems to be assumed in a part of the argument, that as soon as the execution was begun to be executed, the property was altered, which to be sure would decide the question. I take that to be erroneous. The property is so far bound by delivery of the writ, that as between subject and subject the question of priority is determined; but as against the crown it is not bound at all; but I take it the property is in

no sense and to no purpose in this world altered, either by delivery of the writ, or by the actual taking possession of the goods."

This disputed question was subsequently argued in the Court of King's Bench, in a cause (*u*) in which the late Lord Chief Justice Tenterden was counsel, but which went off on a different point.

The question was again discussed in the case of Rex *v.* Sloper (*x*), and decided in favour of the crown. At length the precise point was submitted by the House of Lords to the Judges for their opinion in the case of Giles *v.* Groves, reported in Bingham's Reports and Bligh's Reports (*y*), on the following questions:—

First, "a common person brings his action against "another, and obtains judgment, issues a writ of "*fieri facias* upon that judgment and delivers the "writ to the sheriff, who, in execution thereof, seizes "the goods of the defendant. While the goods are "in the sheriff's hands, and before he has sold them, "a writ of extent in aid is issued against the same "defendant, as debtor of a debtor of the crown, tested "after the seizure under the *scire facias*, and is deli-"vered to the sheriff. Shall this writ of extent be "executed by the sheriff extending the same goods, "seizing them into the king's hands, and selling them "to satisfy the crown's debt, without regard to the

(*u*) Thurston *v.* Mills, 16 East, 254.

(*x*) Rex *v.* Sloper, 6 Price, 114.

(*y*) Giles *v.* Grover, 9 Bingham, 128, and 6 Bligh, N. S. 327.

" writ of *fieri facias* under which he had first seized " them ?"

Second, " All other things remaining the same, " does it make any difference, whether the writ of " extent was in chief or in aid ?"

The judges being divided in opinion, delivered their opinions *seriatim* at considerable length, and eight of them (including the Chief Justices of the King's Bench and Common Pleas) were in favour of the crown, and two in favour of the subject.

The law is, consequently, now settled, that the extent of the crown, whether in chief or in aid, will have preference to the prior *fi. fa.* of the subject, unless the goods have been actually sold (*z*).

By the 13 Eliz. cap. 4, it is enacted, that all the lands and hereditaments, which any accountant to the crown shall have within the time whilst he shall remain accountable, shall, for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his arrears, at any time thereafter to be lawfully (according to the law of the realm) adjudged and determined upon his account, be liable to the payment thereof, and be put and had in execution for such arrears, in like and in as large and beneficial a manner, to all intents and purposes, as if he had *the day he first became accountant*, stood bound by writing obligatory, having the

(*z*) See also Grove v. Aldridge, 9 Bingham, 428.

effect of *a statute staple*, to her Majesty, her heirs or successors, for the true answering and payment of the same arrears. Consequently, the lands of an accountant to the crown are bound from the time the party enters into office (*a*); but the act does not extend to accountants whose receipt does not exceed 300*l.*

Upon an extent in chief against the crown's debtor, if he be an accountant within the 13 Eliz. the writ directs an inquiry to be made with reference to the period at which the lien attached, and at any time since. And the like, if the debt arise upon a bond put on the footing of a statute staple, within the 33 Henry VIII (*b*).

Although, generally speaking, the inrolment of a bargain and sale, under the 27 Henry VIII., c. 16, relates to the time of its execution, so as to avoid all mesne acts of the bargainor; yet, it was held, such relation did not take place on the bargain and sale by commissioners of bankruptcy of the bankrupt's real estate, and therefore the execution of the crown, if tested before the inrolment, found the property still vested in the bankrupt, and consequently extendible (*c*).

(*a*) The case of the Chancellor &c. of Oxford, 10 Rep. 55, 6; The Bishop of Bristow *v.* Coxhead, Mo. 257; Nicholls *v.* How, 2 Vern. 389.

(*b*) Manning's Exch. 536, 537.

(*c*) Perry *v.* Bowers, Sir T. Jones, 196; 1 Vent. 360; 2 Shower, 156; Elliott *v.* Danby, 12 Mod. 3; Doe *v.* Mitchell, 2 M. & S. 446; Manning's Exch. 540.

As the crown is not bound by the statute of frauds, which directs that chattels shall be bound from the delivery of the writ of execution into the hands of the sheriff, the property of the king's debtor is bound from the day of the teste, although the writ were not delivered to the sheriff, or even sued out till long afterwards (*d*). Nor would the assignment of the commissioners of bankruptcy, as against the king, have related to the time of the bankruptcy, as it would between subject and subject (*e*); but if the extent was tested on a day subsequently to the assignment, even to a provisional assignee, it would have come too late (*f*).

By the 1 & 2 Will. IV., cap. 56, all the personal estate of the bankrupt, and all the real estate to which he is absolutely entitled (except copyholds,) now vest in the assignees on their appointment, without either bargain and sale or assignment (*g*).

Extents *in aid*, which, in some cases, were productive of considerable grievance, have been restricted in their operation by a salutary enactment (*h*), by which the sum to be levied under

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(*d*) Manning's Exch. 554.

(*e*) Regina *v.* Arnold, 7 Vin. Ab. 104; Attorney-General *v.* Hanbury, in Scacc. 2 Show. 481; Attorney-General *v.* Capel, 2 Show. 480; Brassey *v.* Dawson, 2 Stra. 978; Manning's Exch. 544.

(*f*) Drury *v.* Man, 1 Atk. 95; *et vide* 14 Ves. 87.

(*g*) *Vide* 3 & 4 Will. IV., c. 74, as to bankrupt tenants in tail.

(*h*) 57 Geo. III. c. 117.

the extent in aid, is confined to the amount of debt actually due to the crown, if the debt due to the king's debtor exceeds the crown debt.

The baron's fiat is the true commencement of the king's suit (*i*).

(*i*) 2 Saund. 70, (f).

CHAPTER VI.

OF THE STATUTES OF FRAUDULENT DEVISES.

THE statute of the 3d & 4th of William and Mary, cap. 14, called the Statute of Fraudulent Devises, introduced a just principle for the relief of creditors, which has since been followed out to its full extent. By that statute, a right of action was given to the specialty creditor against the heir and devisee of his debtor *jointly*, in cases where no provision was made by the will for payment of debts.

The remedy was, however, held to be confined to cases in which action of debt lay, as of bond debts and other specialties for securing a sum certain, and not to extend to damages for breach of covenant, or of contracts under seal (*a*); nor did it provide for the case of a devisee and no heir, nor did it embrace simple contract creditors who, in case their fund was exhausted by the specialty creditors, were driven to their suit in equity to obtain a marshalling of assets.

The 47 of Geo. III., sec. 2, cap. 74, rendered the estates of deceased *traders* liable to their simple contract creditors.

The 1st of Will. IV., cap. 47, proposed to provide

(*a*) Wilson *v.* Knubly, 7 East, 128.

for the defects in the 3 & 4 of William and Mary, in respect of debts by covenant, and cases of a devisee and no heir, and to amend the provisions of the 47 Geo. III. It accordingly repealed both the former acts, and enacted, "That all wills and testamentary limitations, dispositions or appointments already made by persons in being, or thereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her or their decease, should be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, should be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, *covenant*, or other specialty binding his, her or their heirs,) to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect, any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding." And for the means that such creditors might be enabled to recover upon such bonds, *covenants* and other specialties, it was further enacted, "That in the cases beforementioned, every such creditor should and might have and maintain his, her, and their action and actions of debt or covenant upon the said bonds,

covenants and specialties, against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first mentioned devisee or devisees* jointly, by virtue of that act; and such devisee and devisees should be liable and chargeable for a false plea, by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

The statute then provides, "That if in any case there should *not be any heir* at law, against whom, jointly with the devisee or devisees, a remedy was thereby given, in every such case every creditor to whom, by that act, relief was so given, should and might have and maintain his, her, and their action and actions of debt or covenant, as the case might be, against such devisee or devisees *solely*, and such devisee or devisees should be liable for false plea as aforesaid." Thus provision is now made for the case before alluded to, of there being a devisee and no heir to answer the demands of creditors (*a*).

The statute then repeats the provision made in the former acts in favour of limitations for just debts and childrens portions, by enacting, "That where there had been or should be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, tenements or hereditaments for the raising or paying of any real and just debt or debts, or any portion or portions, sum or sums of money,

(*a*) *Et vide* Jarman on Devises, 461.

for any child or children of any person, according to, or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them should be in full force, and the same manors, messuages, lands, tenements and hereditaments should and might be enjoyed by every such person or persons, his, her, or their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made; and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators and assigns for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions should be raised, paid and satisfied, any thing therein contained to the contrary thereof in any wise notwithstanding."

By the operation of this clause, devises for payment of debts are taken out of the statute, and creditors must come in as the will directs, even although the testator should give a preference to simple contract over specialty creditors (*a*), or should direct the debts to be paid out of the yearly rents (*b*), although if the provision made by the will is not sufficient for the purpose, the devise it seems will so far be deemed fraudulent (*c*): a mere charge of debts

(*a*) Miller *v.* Horton, Coop. 45.

(*b*) Lingard *v.* Earl Derby, 1 B. C. C. 311; Earl of Bath *v.* Earl of Bradford, 2 Ves. 577.

(*c*) Hughes *v.* Doulben, 2 B. C. C. 614.

will be as sufficient as a devise for payment of debts, to take the case out of the statute (*d*).

The statute next considers the case of a sale by the *heir* before action brought, and provides, "That in all cases where any heir at law should be liable to pay the debts *or perform the covenants* of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and should sell, alien, or make over the same before any action brought or process sued out against him, such heir at law should be answerable for such debt or debts, *or covenants*, in an action or actions of debt *or covenant* to the value of the same lands so by him sold, aliened or made over, in which cases all creditors should be preferred, as in actions against executors and administrators; and such execution should be taken out upon any judgment or judgments so obtained against such heir to the value of the same land, as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments *bonâ fide* aliened before the action brought, should not be liable to such execution." And it further provides "That where any action of debt or covenant upon any specialty shall be brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing therein contained to the contrary notwithstanding; and the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestors before the original writ brought or bill filed; and if upon the issue joined

(*d*) Bailey *v.* Ekins, 7 Ves. 316.

thereupon it should be found for the plaintiff, the jury should inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment should be given, and execution should be awarded as aforesaid: but if judgment should be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it should be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended." And further, "That all and every the devisee and devisees made liable by that act should be liable and chargeable in the same manner as the heir at law, by force of the act, notwithstanding the lands, tenements, and hereditaments to him or them devised, should be aliened before the action brought."

The statute then re-enacts the provisions of the 47 Geo. III. by providing, "That from and after the passing of the act, where any person being at the time of his death a trader, within the true intent and meaning of the laws relating to bankrupts, should die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, *which he should not by his last will have charged with, or devised subject to or for the payment of his debts*, and which would be assets for the payment of debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor,

and the devisee or devisees of such first-mentioned devisee or devisees, should be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound; provided, that in the administration of assets by courts of equity, under and by virtue of that provision, all creditors by specialty, in which the heirs were bound, should be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs were not bound, should be paid any part of their demands."

The provisions of this statute were a great improvement of the law; but which still remained defective in respect of the claims of simple contract creditors on the real estates of their deceased debtors, not being traders.

To remedy this, the 3 & 4 Will. IV. c. 104, was passed, by which all the freehold and copyhold estates of a deceased debtor are made liable to the payment of simple contract as well as specialty debts. By that statute it is enacted, "That when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, *which he shall not by his last will have charged with or devised subject to the payment of his debts*, the same shall be assets to be administered in courts of equity for the payment of the

just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of that act, liable to in respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound: Provided, that in the administration of assets by courts of equity under and by virtue of that act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

Thus, although under the ancient feudal law the real estates of debtors could not by any process be taken in execution for any of the debts of their creditors, on the ground that otherwise persons might, by such circuitous mode, have been introduced into the feud without the lord's consent; and although the principle so established long maintained its ground, and yielded at first only to the claims of judgment and afterwards of specialty creditors; yet, at length, principles more just made their way to the notice of the legislature, and opened the door wide to the claims of every species of creditors over every species of estates.

BOOK THE SECOND.

OF THE DIFFERENT SUBJECTS AND MODES OF MORTGAGE, AND ALSO OF THE TRANSFER OF MORTGAGE.

CHAPTER I.

OF THE SUBJECTS OF MORTGAGE.

HAVING attempted to trace the progress of mortgages, from their origin at common law to their establishment with an equity of redemption, under the protection of the courts of equity; and having also treated of judgments, statutes and recognizances, it will next be proper to consider the subjects and modes of mortgage.

The consideration of the *subjects* of mortgage we may briefly dismiss; for it may be laid down as a general proposition, with few exceptions, that every species of property, real or personal, corporeal or incorporeal, moveable, or immoveable, in possession, remainder, expectancy, or even in action, is the subject of mortgage. Manors, lands and tenements, freehold, copyhold and leasehold; remainders or re-

versions, rents, franchises, advowsons, rectories impropriate, tithes, bills of lading, ships, freightage, articles of merchandize, bills of exchange, debts, government annuities, title deeds, and even possibilities, may, according to their several natures, be conveyed, transferred, delivered or assigned, by way of mortgage security.

The exceptions to the general rule appear to be —Pensions granted for supporting the grantee in the performance of future services, such as the pension granted by the 5th Ann. cap. 4, for the more honourable support of the dignities of the Duke of Marlborough (*a*) and his posterity, payable out of the revenue of the Post Office; the salaries of the judges, given for the support of the dignity of their office (*b*); annuities pro consilio impendendo (*c*); full pay and half pay of an officer (*d*); the commission of an officer (*e*); and (since the 57th Geo. III. cap. 99) church livings (*f*); and the future interest of a married woman, in chattels personal, in the event of her surviving her husband, and the latter dying prior to the chattel personal being reduced into possession (*g*); and also, as it seems, the life

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(*a*) Davis *v.* the Duke of Marlborough, 1 Swanst. 74.

(*b*) Ibid. arguendo. (*c*) 1 Dyer, 2 a, n.

(*d*) Barwick *v.* Reade, 1 Wm. Blackst. 627; Flarty *v.* Odlum, 3 Term Rep. 681; Lidderdale *v.* the Duke of Montrose and another, 4 Term Rep. 248; Stone *v.* Lidderdale, 3 Anstr. 533; M'Carthy *v.* Goold, 1 Ball & Beattie, 387.

(*e*) Collyer *v.* Fallon, 1 Turner & Russell, 459.

(*f*) *Vide infra*, Book II. c. 11. (*g*) *Vide infra.*

interest of a married woman in a personal fund beyond the duration of the coverture (*h*).

We shall in the subsequent chapters of this book, consider the modes by which the different species of property may become the subject of mortgage, and also of the transfer of mortgages generally, and of the stamps on mortgages and assignments of mortgage.

(*h*) Stiffe *v.* Everitt, 1; Mylne *v.* Craig, 37.

CHAPTER II.

OF MORTGAGES OF FREEHOLDS.

In its commencement, the form of the mortgage security was simple. The old *mortuum vadium* has been already described (*a*). The mortgage, which supplanted it, has been shewn (*b*) to have been a feoffment, with a condition contained in the same deed, or sometimes in a separate deed of defeasance (executed at the same time) to be void on payment of a given sum, at a given time. On performance of the condition, the mortgagor, as before shewn (*c*), was restored to his old estate, paramount all the charges and incumbrances of the feoffee.

The mortgage, by way of absolute conveyance, with the clause of redemption in a separate deed of defeasance, being liable to be made the means of fraud, was much discountenanced by the Courts. Lord Chancellor Talbot, in Cotterel *v.* Purchase (*d*), observes, " In the northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage

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(*a*) *Supra.* (*b*) *Supra.*
(*c*) *Supra.* (*d*) Cotterel *v.* Purchase, *supra.*

the practice as much as possible." And in a case (*e*) in which lands were conveyed by an absolute deed of conveyance, and there was a separate agreement between the parties, that on the creditor being reimbursed what he advanced, and 50*l.* over for improvements, he should reconvey. The mortgagor died, leaving an infant son, who, within one year after he came of age, but twelve years after the transaction, filed his bill to redeem. Lord Chancellor Hardwicke said, " the not inserting the clause in the deed was an imposition on the mortgagor, but the reason was, that he was in distress, and therefore turned it into the shape of a purchase, but still he meant it as a security. Wherever the Court finds such a clause as this, it adheres to it strictly, to prevent the equity of redemption from being entangled to the prejudice of the mortgagor," and he decreed a redemption with costs against the mortgagee. But the great objection to this form of mortgage was, that the estate might be conveyed to a *bonâ fide* purchaser without notice; in which case the right to redeem would be wholly defeated, and the mortgagor be left to his remedy against the mortgagee for the fraud. In consequence of the discouragement it received, this mode of mortgage has become almost obsolete.

In some instances, the mortgage used to be effected by a demise and redemise, that is, the mortgagor demised the lands to the mortgagee for a long

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(*e*) Baker *v.* Wind, 1 Ves. 160.

term of years, at a pepper-corn rent, and then the mortgagee redemised them at a pecuniary rent, which covered the interest of the money lent, and there was a condition in the original demise, that on payment of the mortgage debt and interest by a given day, the original term should be at an and; upon which the derivative term would also cease. This mode of mortgage is also nearly obsolete; but if an estate be in hand, and there is a wish to obtain a power of distress for payment of the interest of the mortgage debt, an underlease might be still advantageously resorted to. It would, however, it is apprehended, require the duty to be paid as on a *bonâ fide* lease, and instead of an underlease, a practice in some cases prevails of conveying the lands to a trustee in fee, with a proviso authorizing him to distrain on the lands in the mortgagor's possession, in case the interest shall be in arrear for a given time, with a further declaration, appointing the trustee the receiver during the time the lands shall be in lease. Or the mortgagor may give a power of attorney to confess judgment in ejectment, in case the interest shall be in arrear (*f*), with a covenant to appoint such person a receiver as the mortgagee shall name, in case the lands shall be let.

Mortgages of freeholds, in modern practice, are either in fee or for such other interest as the mortgagor has in the lands, or by demise for a long term

(*f*) For a precedent of a Power of Attorney of this sort, see Appendix, No. I.

of years, attended with a condition in the same deed, that if the principal and interest be paid within a given time, the lands shall be reconveyed; or the deeds of mortgage shall be void; or the term shall cease and determine (*g*). It has been already said (*h*), that if the former be the wording of the proviso, and the money be actually paid within the limited time, a reconveyance will nevertheless be necessary; but if the latter be the form, then, on payment of the money within the period mentioned in the condition, the estate of the mortgagee will *ipso facto* determine. If the mortgage be by term of years, a covenant is usually inserted on the part of the mortgagor, that after default made, he or his heirs will at his own costs do all lawful acts for confirming the term, or, if required, for conveying the reversion in fee to such persons as the mortgagee, his executors, administrators or assigns shall direct; for otherwise the mortgagee would on foreclosure obtain a chattel interest only, and not the fee. The benefit resulting from the mortgage being in the first instance for a term of years, and not in fee, is, that the security and debt devolve together; but if the mortgage be in fee, the land will descend to the heir as a trustee for the executor, and the debt vest in the executor, which, in case of the infancy or absence of the heir, creates inconvenience, and in a recent case in Ireland (*i*), Lord Redesdale said, he remembered a case in which

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(*g*) For a Precedent of Mortgage, see App. No. II.

(*h*) *Supra.*

(*i*) Schoole and Wife v. Sall, 1 Scho. & Lef. 177.

the Court restrained the executor of the mortgagee from proceeding at law to compel payment of the debt on the bond, because the concurrence of the heir of the mortgagee in a reconveyance could not be obtained, and the money was ordered into Court until the executor could find the heir.

By a series of legislative omissions, the case of the heir of a *mortgagee* not being known has not been yet provided for. The statutes of the 6 Geo. IV. and 1 Will. IV. have authorized the Court of Chancery, on petition, to appoint some person to convey the legal estate in cases where the heir of a *trustee* cannot be found; and it has been already noticed, that by the cases of Ex parte Goddard (*k*) and Ex parte Stanley (*l*), it is decided that those statutes do not reach the case of the heir of a *mortgagee* not being known. The 4 & 5 Will. IV. (*m*) has provided for the case of there being *no heir* of a trustee *or mortgagee;* but the framers of that act, not being aware of the decisions in Ex parte Goddard and Ex parte Stanley, have not remedied the defect in the former acts of the heir of a mortgagee not being known, unless it should be thought that the legislature, by referring to the former acts in the latter statute as applying to the case of the heir of a mortgagee, has declared such to be the true meaning of those enactments.

(*k*) 6 Geo. IV. c. 16, and 1 Will. IV. c. 60.
(*l*) *Supra.* (*m*) 4 & 5 Will. IV. c. 23.

In a bill now before parliament it is intended to provide, that the executors or administrators of a mortgagee in fee may convey the legal estate, which will be a great accommodation in practice.

A mode of mortgage has been suggested in cases where two persons are advancing money at the same time on one estate, and preference is not wished to be given to either, and each is desirous of having a lien on the whole estate, and yet of avoiding the intervention of a mutual trustee, viz. limiting one moiety of the estate to one mortgagee for a long term of years, with remainder to the other mortgagee in fee, and the other moiety *vice versâ*. Thus each mortgagee is first mortgagee for a long term of years of one moiety, and second mortgagee in fee of the other moiety. Several conditions for redemption are inserted (*n*), with several covenants for title with each mortgagee.

(*n*) For a precedent of these conditions in mortgage, see Appendix, No. III.

CHAPTER III.

OF MORTGAGES OF COPYHOLDS.

MORTGAGES of copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender in the manor court by the mortgagor to the mortgagee and his heirs. By the condition, the surrender is made void, on payment by the mortgagor, &c. of principal and interest to the mortgagee, &c. on a given day; the condition is entered on the rolls, and immediately follows the surrender. The condition may, however, be contained in a separate deed of defeasance, of even date with the surrender; but as remarked by Mr. Watkins (*a*), this mode should never be resorted to when it can be avoided; for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult, and besides the title to the lands should always appear on the records of the manor; and, therefore, even if a separate deed of defeasance be executed, it should be always entered on the rolls.

Another important reason against having an absolute surrender, with a separate deed of defeasance,

(*a*) Watkins's Copyholds, vol. i. page 116.

formerly existed, viz. that if the mortgagee died without an heir, the lord of the manor might enter for the escheat, inasmuch as he had no notice of the condition on his court rolls (*b*). In the case of the Attorney-General *v.* Duke of Leeds, an absolute surrender had been made by Benjamin Clarkson to John Crosse, on which Crosse was admitted. The surrender was, in fact, to secure 700*l.* and interest, but of which no mention was made on the court rolls. Crosse, by his will, gave his personal estate to charitable uses, which, as to the mortgage-money, was within the mortmain acts, and void, and the crown claimed to be entitled. Crosse did not dispose of the copyhold by his will, and being illegitimate, died without an heir, on which the Duke of Leeds, as lord of the manor, entered, claiming it as an escheat, and granted it to the widow and administratrix of Clarkson. A suit was instituted by way of information and bill by the Attorney-General and the executor of Crosse against the Duke of Leeds and administratrix and customary heir of Clarkson, praying that the administratrix and heir might be decreed to pay the mortgage-money, and that the duke might be declared a trustee for the crown. The information and bill were dismissed without costs.

But if the lord has notice of the condition for redemption, or of any trusts, although only referred to as subsisting in a separate deed, he will be bound; and if the trusts are by way of mortgage security,

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(*b*) Attorney-General *v.* Duke of Leeds, 2 Mylne & Keen, 343.

the mortgagor will be entitled to re-admittance on payment of the debt (*c*).

The legal rights of the lord claiming by way of escheat in default of heirs have however now been placed under the control of the Court of Chancery, for the benefit of the parties beneficially entitled by the 4 & 5 Will. IV., cap. 23, as before noticed (*d*).

If a copyhold is devised, charged with a sum of money applicable for charitable purposes, and the testator leaves no customary heir, or next of kin, the crown will be entitled to the sum charged by force of its prerogative, whether the charge is to be considered in the nature of real or personal estate (*e*).

On performance of the condition, by payment of the money, the surrender is at an end, and the surrenderor is in possession *in statu quo*, without any readmission or fine (*f*).

As well in the case of a conditional as of an absolute surrender, the surrenderor remains tenant to the lord until the admission of the surrenderee, so much so, that, prior to the 55 Geo. III., cap. 192, the mortgagor could not, after the conditional surrender, and before the admission of the surrenderee, devise the copyholds without a previous surrender to

(*c*) Weaver *v.* Maule, 2 Russ. & Mylne, 97.

(*d*) *Supra.*

(*e*) Attorney-General *v.* Henchman, 2 Sim. & Stuart, 498.

(*f*) Simonds *v.* Lawnd, Cro. Eliz. 239.

the use of his will (*g*). If the surrenderee is admitted, and the condition is broken by the nonpayment of the money, his estate is absolute; and when the mortgage is paid off, a readmission and fine will be necessary, and the mortgagor will thereupon gain a new estate, and the descent be altered, so that if the lands had originally descended to him *ex parte maternâ*, they will afterwards descend as if he had taken by purchase (*h*).

Unless there is a special custom in the manor, by which the lord may compel a surrenderee to come in and be admitted, he cannot, it should seem, compel the mortgagee to be admitted, even after condition broken (*i*); but if there is such a custom in the manor, it seems he may compel him, and a Court of Equity will not give relief (*j*).

If the conditional surrenderee has not been admitted, the practice is, on payment of the money, for the mortgagee to give a warrant to the steward to vacate the surrender, and thereupon the surrender is at an end (*k*).

(*g*) Doe *v.* Wroot, 5 East, 130; Kennebel *v.* Scrafton, 8 Ves. Jun. 30.

(*h*) Benson *v.* Scott, 12 Mod. 49; Hannam *v.* Morgan, 7 T. R. 103.

(*i*) Basspool *v.* Long, 1 Roll. Ab. 568; Cro. Eliz. 879; 1 Show. 30, 83; King *v.* Dilliston, 1 Salk. 386; Carth. 41; Prec. in Ch. 573.

(*j*) Tredway *v.* Fotherley, 2 Vern. 367.

(*k*) Mr. Watkins in his treatise on copyholds, (page 184, vol. i. 2d edit.) says, in case the money is paid *within* the time prescribed

After the conditional surrenderee has been admitted, he becomes tenant to the lord, and the surrenderor may, before condition broken, release to him the benefit of the condition (*l*), and, after condition broken, he may release him to the equity of redemption; and no fine will in either case be necessary, for the mortgagee is already in possession, and on his admittance a fine has been already paid (*m*).

After condition broken, and before admittance, the mortgagee may file his bill to foreclose (*n*).

The equity of redemption may be of course mortgaged without surrender, and will pass by deed, being an equitable interest only; but if undisposed of, it will descend to the customary heir of the surrenderor, as the legal estate would have done (*o*).

A tenant in tail of an equity of redemption may bar the entail and remainders over, by deed enrolled in the manor, or by actual surrender as prescribed by 3 & 4 Will. IV. cap. 74.

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by the condition, the surrenderee acknowledges the repayment, and authorizes the steward to vacate the surrender; he afterwards adds, this formal mode is not necessary, for on payment of the money within the prescribed time, the surrender is *ipso facto* void. It is suggested, this mode of vacating the surrender is more usually practised in cases in which the money is *not* paid within the time, on which it becomes necessary to authorize the steward to vacate the surrender, than in the instance put by Mr. Watkins. See Burgaine *v.* Spurling, Cro. Car. 283.

(*l*) Hull *v.* Sharbrook, Cro. Jac. 36; Kite *v.* Queinton, 4 Co. 25.

(*m*) Kite *v.* Queinton, *supra*.

(*n*) Sutton *v.* Stone, 2 Atk. 101.

(*o*) Fawcett *v.* Lowther, 2 Ves. 304.

As the mortgagor remains tenant to the lord until the admittance of the mortgagee, the copyhold will on his death descend on his customary heir (*p*), and a heriot will become due (*q*).

A surrenderee not being tenant until admittance, cannot in the mean time pass the lands by surrender (*r*), although he may make an equitable transfer of them. He may also devise the lands and they will pass in equity (*s*), but the devisee will not be entitled to admission as legal tenant, for a legal devise of copyholds cannot be made before admittance (*t*), and therefore, although the devisee is admitted, the surrenderor or his heir will still remain tenant to the lord. But equity will consider the legal tenant to be a trustee for the devisee. The proper course to be pursued probably would be for the heir of the surrenderee to be admitted, and to make a surrender to the devisee. In the case of Doe *v.* Vernon (*u*), it was held that the devisee (who had been admitted) of a devisee, who had died without admittance, could not maintain ejectment as the legal tenant.

So long as the transaction between the mortgagor and mortgagee rests in covenant, if the mortgagee assign his equitable interest by deed, and the mort-

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(*p*) Frosel *v.* Welsh, Cro. Jac. 403.
(*q*) 2 Watkin's Copyholds, 158, 2d edit.
(*r*) Doe *v.* Tofield, 11 East, 246.
(*s*) Davie *v.* Beversham, 3 Ch. Rep. 2.
(*t*) Doe *v.* Tofield, *supra.* (*u*) 7 East, 8.

gagor surrender to the assignee, he may compel the lord by mandamus to admit him without a double fine (*x*). The reader will observe that Mr. Watkins, in his treatise on copyholds (*y*), refers to this case, as an authority, that if a *surrenderee* before admittance assign by deed, the lord must admit the assignee without a double fine; but it will be seen the case applies to an assignment by a covenantee only, and not by a surrenderee.

If the mortgagor dies before the admittance of the mortgagee and a heriot is paid, and the mortgagee afterwards dies, and his heir claims to be admitted, Mr. Watkins (*z*) makes a query, whether, inasmuch as the admittance of the surrenderee or his heir always relates to the time of the surrender, so as to avoid all intermediate rights and interests contrary to the surrender, such as the free-bench of the surrenderor's widow and the like (*a*), a heriot will not on such admittance become due, as if the surrenderee had died seised; and if so, whether the lord ought not to return the first heriot. Arguing from principle, it would seem that such would be the law, for after the admittance of the heir of the surrenderee, it would be difficult to contend that, *fictione juris*, the surrenderee died seised, so as to avoid the widow's free bench, &c. but not so as to give the lord a right to his heriot, and the law

(*x*) Rex *v.* The Lord of the Manor of Hendon, 2 Term Rep. 484.

(*y*) Watkins on Copyholds, vol. i. 161, 2d edit.

(*z*) Ibid. vol. ii. 158, 2d edit.

(*a*) Benson *v.* Scott, 1 Salk. 185; Vaughan *v.* Atkins, 5 Burr. 2785.

would scarcely permit the lord to hold both. But the case has not been decided.

From this doctrine of relation the surrenderee may in ejectment after admittance, lay his demise in the interim between the admittance and surrender; and recover mesne profits from the time of the surrender (*b*).

The mortgagor may in the mean time, and until the admittance of the mortgagee, make a second surrender, which will be good if the first surrender is not perfected by admittance (*c*).

Since the passing of the 55 of Geo. III., cap. 192, surrenders of copyholds to the use of the will are no longer necessary. But prior to that statute a surrender made by the mortgagee to the use of his will before admittance, was void, and would not have been made good by a subsequent admittance (*d*).

A general devise of real estate will, since the statute, pass copyholds, although there are freeholds to satisfy the words of the will (*e*), if the will was made subsequent to the statute, but not if the will was made prior to the statute, although the death of the testator was subsequent to it (*f*).

(*b*) Holdfast *v.* Clapham, *supra*; Roe *v.* Hicks, 2 Wils. 15.
(*c*) Burgaine *v.* Spurling, 1 Term Rep. 601.
(*d*) Doe *v.* Tofield, *supra*.
(*e*) Doe *v.* Ludlam, 7 Bingham, 275.
(*f*) Doe *v.* Bird and another, 5 Barnewall & Adolphus, 695.

If the surrender is made out of Court, it is sometimes permitted to be vacated for want of a proper presentment, and a new surrender is taken (*g*).

In some instances the mortgage consists merely of the surrender and condition entered on the rolls; but more frequently there is a previous covenant to surrender, containing covenants for the title, and for payment of the money, which otherwise the mortgagee does not obtain.

(*g*) Fawcett *v.* Lowther, *supra.*

CHAPTER IV.

OF MORTGAGES OF LEASEHOLDS.

WHEN leaseholds are made a mortgage security it is usual, in order to avoid liability of the rent and covenants in the original lease, to take an underlease at a pepper-corn rent, reserving the last day, or a few days of the original term, and the mortgagor covenants to pay the rent and perform the covenants in the original lease. This precaution of an underlease should never be neglected, if the rent be heavy or the covenants burthensome; for otherwise, the mortgagee, whether he takes possession or not, will become liable to all the covenants which run with the land (*a*).

There is indeed a well-known decision opposed to the position, that he will be liable if he does *not* take possession, viz. the case of Eaton and Jaques (*b*), which was tried before Mr. Justice Buller, at the sittings for Middlesex, in Trinity Term, 1780, when the precise point appears for the first time to have been agitated in a Court *of law*, and on which a case was reserved for the opinion of the Court of King's Bench.

It had been considered to be clear law by Lord

(*a*) Traherne *v.* Sadleir *et al.* 5 B. P. C. 179.

(*b*) Eaton *v.* Jaques, Doug. 438.

Chief Justice Holt (*c*), that on an *absolute assignment*, the estate vested in the assignee before entry; for which reason his Lordship seemed to think the ancient method of pleading, "*virtute cujus*" the assignee entered and *was possessed*, was now disused; and *in equity* it had been received as undoubted law, that the same doctrine applied to a conditional assignment by way of mortgage. Thus in a case (*d*) where a lease had been granted with covenants to repair, and the lease had been assigned by way of mortgage, and the mortgagee had never entered; the houses being greatly out of repair, the lessor filed his bill against the assignee to compel him to discover whether the lease was not assigned to him, and for specific performance of the covenants. The Court said, it was the mortgagee's folly to take an assignment of the whole term, *and thereby subject himself to the covenants;* but as he was only a mortgagee not in possession, the Court would not assist the plaintiff to charge the defendant, or compel him to perform the covenants, but would leave him to his remedy at law. And in another case in equity (*e*), where a lease had been assigned by way of mortgage; but the mortgagee had never entered: the lessor recovered in an action at law against the mortgagee for rent; whereupon the mortgagee filed her bill for relief, but it was dismissed, *she being ill advised to take an assignment of the whole term:* so that, in both the preceding cases, it was taken for granted the

(*c*) Cook v. Harris, 1 Lord Raym. 367.

(*d*) Sparkes v. Smith, 2 Vern. 276.

(*e*) Pilkinton v. Shaller, 2 Vern. 374.

mortgagee was liable, although not in possession, and, in the last case, the lessor, as before stated, had actually recovered against the assignee in an action at law for the rent.

The Court of King's Bench, however, seemed to consider these cases of little weight, and decided that the mortgagee was not liable to be sued on the covenants, as he had not taken possession. The reasons given by Lord Mansfield for his judgment, shew to what an extent that able judge was inclined to carry into a Court of common law the principles of the civil law. He said, "to do justice between men, it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties. Can we (he asked) shut our eyes and say it was an absolute conveyance? It was a mere security; it was not an assignment of *all* the mortgagor's estate, right, title, &c." In this Willes and Ashurst, justices, coincided. But Mr. Justice Buller went further; after stating that Lord Holt was mistaken as to the form of pleading, for he had looked into the precedents, and they always allege *virtute cujus* the assignee entered and *was possessed*, he added, he did not agree that, *even if the assignment was absolute*, the action would lie without possession, and further added, "there is no instance."

This judgment seems to have produced the case of Walker *v.* Reeves (*f*), which was heard in the

(*f*) Walker v. Reeves, Doug. 445.

King's Bench, in Michaelmas Term, the 22 Geo. III. and which was, in fact, the case of a mortgage security, although in the pleadings before the Court it appeared to be an absolute assignment. The question there was, whether an assignee of a lease, who had, before the rent became due, assigned the lease to one Biggs, who had never entered, was liable for the rent which had accrued due *since* the assignment. The defendant pleaded the assignment. The plaintiff replied that Biggs had not taken possession, and relied on Eaton *v.* Jaques. The counsel for the defendant insisted that the case of Eaton *v.* Jaques turned on the fact of its being a mortgage security, and urged, that none of the reasoning in that case was applicable to an absolute assignment. In this the Court coincided, and Lord Mansfield, in giving judgment, said, "By the assignment, the title and possessory right passed, and the assignee became possessed in law, and this case is by no means like Eaton *v.* Jaques, which, being a mortgage, was not an assignment for this purpose; it was a mere security." The reporter adds, that "if the plaintiff, instead of replying that Biggs did not take possession, had traversed by his replication the allegation of the plea, that the defendant had assigned *all* his estate, &c. and upon issue joined, it had appeared on the trial, that the assignment contained a proviso of redemption, it should seem he would have been entitled to a verdict on the authority of Eaton *v.* Jaques." Walker *v.* Reeves, therefore, put the judgment in Eaton *v.* Jaques on the true ground on which that decision was made, viz. that it was a mortgage security, and totally overruled the doubt thrown out

by Mr. Justice Buller, whether, on an absolute assignment, the estate vested in the assignee before entry.

The doctrine laid down in Eaton *v.* Jaques was again recognized in a case in the Court of King's Bench (*g*), and in a subsequent case in the Common Pleas (*h*). In the former of which cases the Court determined that a mortgagee of a ship, of which he was out of possession, could not be considered the owner so as to maintain an action at law for the freight; and in the latter case the Court decided, that a mortgagee so placed was not answerable for the goods furnished for the use of the ship. This former case was heard before three of the Judges who decided Eaton *v.* Jaques, namely, Mansfield, Ashurst, and Buller; and the latter case before two of the Judges of the Common Pleas, namely, Heath and Wilson, the Chief Justice Loughborough and Mr. Justice Gould being absent.

Succeeding Judges, however, seem to have been little inclined to acquiesce in the authority of Eaton *v.* Jaques. More especially the learned Judge who immediately followed Lord Chief Justice Mansfield in the Court of King's Bench, and who was peculiarly well qualified, from his profound knowledge of the Common Law of England, to correct the equitable innovations of his predecessor, expressed his dislike

(*g*) Chinnery *v.* Blackburne, 1 H. Blackstone, 117, note.
(*h*) Jackson *v.* Vernon, ibid.

of the doctrine. In the case of Westerdell *v.* Dale (*i*), which was argued in the Court of King's Bench in Trinity Term, 1797, Lord Kenyon said, "As to the cases respecting a mortgagee, whether in or out of possession, he is the legal owner, and must be so considered in a Court of Law, notwithstanding his title is subject to equitable interests. It is said in one of the cases, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading that he entered and was possessed; but with great deference to the learned Judge who gave that reason, I doubt it; I consider those as formal words."

The precise point afterwards arose in an action tried before his Lordship in Trinity Term, 39 Geo. III., the particulars of which are stated in Woodfall's Landlord and Tenant (*k*). The original lessee of a term brought an action against a sub-assignee, to whom it had been assigned by way of mortgage, for the recovery of ground-rent paid by the original lessee in respect of the lease during the interest of the defendant as mortgagee.

In this instance Lord Kenyon is stated to have said, "the defendant is liable as assignee; his liability is not limited to his possession; but as long as

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(*i*) Westerdell *v.* Dale, 7 Term Rep. 312.

(*k*) Stone *v.* Evans, Woodfall's Landlord and Tenant, 113, second edit.; *et vide* Turner *v.* Richardson, 7 East, 340, note.

he had the legal estates, so long he continued liable to the covenants in the lease; if he wished to avoid that liability, he should have taken an underlease. As to the case of Eaton *v.* Jaques, he would overrule it without the least reluctance." And a verdict was given accordingly.

A more recent case occurred (*l*), which may also be considered to be opposed in principle to the case of Eaton *v.* Jaques, although the Court in deciding it professed neither to impugn nor confirm that decision. In that case it appeared that one Denton had granted to the corporation of Carlisle, and their successors, so much of the river Caldew running through his lands, as would be sufficient for working certain mills, and had covenanted for himself, his heirs and assigns, against the obstruction of the water. He afterwards mortgaged the lands to one Wilson in fee, who never entered. After this Denton died, having devised the lands to the defendants, against whom an action was brought by the corporation for breach of covenant, as assignee of all the estate and interest of Denton in the lands. The Court said, that whether a mortgagee before entry was liable or not, it was quite clear the devisees of an equitable estate (which was the only character that could be ascribed to the defendants on the record) were not so; and judgment was given for the defendants.

Now it would seem to follow, as almost an inevi-

(*l*) Mayor of Carlisle and others *v.* Blamire, 8 East, 487.

table consequence, that, if the devisee of an equity of redemption of a mortgaged estate, into which the mortgagee has never entered, has in the eye of a Court of law only an equitable estate, not recognizable at common law, the mortgagee himself must at common law be considered the person liable to covenants, for otherwise the covenantee is without remedy as against the holder of the land.

To these cases may perhaps be added, the authority of the opinion of Lord Chancellor Thurlow, who within a few years after the decision in Eaton *v.* Jaques, decided a case in equity (*m*), in which, from the wording of his judgment, his lordship does not seem to have at all acquiesced in the doctrine laid down in Eaton *v.* Jaques. A lease had been granted with covenants for rebuilding, &c. This lease had been deposited by the lessee with a creditor to secure a debt. The executors of the lessor filed their bill against the depositary for a specific performance of the covenants to rebuild. The defendant in his answer admitted he was liable to the other covenants, but denied, he was bound to rebuild. The Lord Chancellor said, "it was no matter whether the defendant took the lease as a pledge or as a purchase; he could not take the estate and refuse the burthen; it was nothing to the lessor." And after refusing the prayer for specific performance, he decreed the defendant should execute an assignment to enable the plaintiff to

(*m*) Lucas *v.* Comerford, 1 Ves. Jun. 235.

bring an action at law. Lord Chancellor Thurlow therefore apparently could not have doubted, the mortgagee was liable to an action on the covenants before entry.

In a recent case (*n*), the question was again argued in Serjeants' Inn Hall before ten of the judges, and the authority of Eaton *v.* Jaques *expressly overruled.* It is therefore now clear, both on principle and sound authority, notwithstanding the case of Eaton *v.* Jaques, that if a mortgagee accepts an assignment of all the remaining interest in the term, he will be liable to the payment of the rent, and performance of the covenants in the original lease, so long as he shall be the legal owner of the lease, although he shall not take actual possession of the premises.

The reader will remark, that in the aforegoing cases of Sparkes *v.* Smith, and Pilkington *v.* Shaller (*o*), a Court of Equity would not, on the one hand, assist the lessor on bill filed by him against the mortgagee for a discovery of the deed of assignment to him, and for a specific performance of the covenants, but left the lessor to his remedy at law; so neither would it, on the other hand, after the lessor had obtained judgment against the mortgagee at law, for the arrears of rent, give the mortgagee relief, although he had never been in possession; but in the case of Lucas *v.* Comerford (*p*), the Court so far assisted the

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(*n*) Williams *v.* Bosanquet, 1 Broderip & Bingham, 238.
(*o*) *Supra.* (*p*) *Supra.*

lessor as to decree the depositary of a lease to execute an assignment to enable the lessor to bring his action against him at law.

It is decided, that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly (*q*); the mortgagee however, is not bound to renew, and in case he does, will be entitled to his costs in effecting the renewal, with interest (*r*).

When *a renewable lease* is made the subject of mortgage, a covenant should be introduced on the part of the mortgagor, for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do so (*s*). And there should be added an agreement (*t*), that, if he refuses, it shall be lawful for the mortgagee to renew and to charge the estate with the costs and interest.

A mortgage of a leasehold messuage will comprise the good-will of the business carried on there, so that if the house and good-will are put up to sale,

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(*q*) Holt *v.* Holt, 1 Ch. Ca. 190; Rakestraw *v.* Brewer, Select Ca. in Ch. 55; Lee *v.* Vernon, 5 B. P. C. 10.

(*r*) Lacon *v.* Mertins, 3 Atk. 4; Godfrey *v.* Watson, ibid. 518; Manlove *v.* Bale, 2 Vern. 84.

(*s*) Lacon *v.* Mertins, *supra*.

(*t*) For a precedent of such Covenant, see Appendix, No. 4.

the mortgagee will be entitled to have the whole produce of the sale applied towards satisfaction of his debt (*u*).

If an equitable mortgagee of a leasehold apply for a sale in a case of bankruptcy, the Court will not order the parties to indemnify the assignees against breach of covenants, but will give the assignees time to consider whether they will accept or reject the lease (*x*). And if the assignees do not come to a decision within a reasonable time the Court will make the usual order, giving the assignees the option to conduct the sale if they choose (*y*).

It has been already remarked, that a release by the mortgagee of the right of renewal, will not be binding on the mortgagor or his representative claiming a right to redeem (*z*).

(*u*) Chissum v. Dewes, 5 Russell, 29.
(*x*) Ex parte Fletcher, 1 Dea. & Chit. 318.
(*y*) Ibid. 356. (*z*) *Supra*, page 41.

CHAPTER V.

OF MORTGAGES WITH POWER OF SALE.

It is now usual in practice to give the mortgagee a power of sale over the estate in case default is made in payment of the mortgage-money beyond a time limited. The modes of accomplishing this are various. In some instances, the estate is limited to the use of the mortgagee for a term of years, with the usual proviso for redemption, and subject thereto, to the use of trustees in fee upon trust to sell. In other instances it is limited at once to trustees in fee, in trust to sell if the money is not paid at a given day; and the proviso for redemption is also inserted. In other instances, it is limited to the mortgagee in fee, upon trust to sell if the money is not paid as in the preceding instance; and, in other instances, it is limited to the mortgagee in fee, with the usual proviso for redemption, attended with a declaration, that if default is made in payment at the given time, it shall be lawful for the mortgagee, his heirs or assigns, after notice in writing requiring payment, to sell, &c. To which it may be proper to add a proviso that such power of sale shall not prejudice his right of foreclosure; and that the assigns of the mortgagee, their heirs or assigns shall have the like powers as if they had been parties to the deed.

Either mode is valid and effectual, but the latter

is most to be recommended; for, on breach of the proviso, it bestows on the mortgagee an absolute estate; and at the end of a further time gives him a power of sale; and leaves open to him the option, in the mean time, of filing his bill to foreclose.

Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of Equity (*a*), but they were groundless; a slight consideration will shew they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal, interest, and costs; they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt.

The case of Croft *v.* Powell (*b*) was considered as raising considerable grounds for doubt (*c*); but so far from it, it will, on consideration, be seen to be rather an authority in favour of these powers. That case was as follows. In 1703, Rouse conveyed lands to Baldwin in fee, with a defeasance by way of mortgage, and it was agreed, that if the money was not paid by the appointed time, it should be lawful for Baldwin and his heirs to mortgage or *sell* the lands *free from redemption;* and out of the money raised by such mortgage or sale, retain the mortgage-money

(*a*) Powell on Mortgages, 1 vol. 14, 4th edit.
(*b*) Croft *v.* Powell, Comyn's Rep. 603.
(*c*) Powell on Mortgages, 1 vol. 14, 4th edit.

and interest, and be accountable for the overplus to Rouse and his heirs. Default was made in payment, and the lands were afterwards charged by Rouse with further sums of money to other persons. In the year 1716, Baldwin agreed to sell the lands to Gab. Powell for 4300*l.* and to warrant the same to him and his heirs, *except as thereinafter excepted, in which exception was contained the mortgage defeazance;* and accordingly by lease and release of the 25th and 26th of March, 1716, Baldwin conveyed the lands to Powell in fee, and in the conveyance *the defeasance* was mentioned and *excepted,* and Baldwin covenanted that 4400*l.* was due to him on the mortgage. It further appeared that Rouse and wife had levied a fine of the premises to Baldwin, and that Baldwin had for some time before the sale been in possession, and had presented to a benefice belonging to the estate which had become vacant, and that Rouse was privy to the agreement for sale to Powell. It also appeared, that in 1719 Powell had filed his bill in the Exchequer against Rouse and wife, praying to be quieted in possession, or that, *if* the estate was redeemable, Rouse might be decreed to redeem, or be foreclosed, on which Rouse filed his cross-bill to redeem, and Powell, in his answer to the cross-bill, insisted that the fine was levied by way of confirmation to Baldwin, who thereupon took upon himself to be absolute owner, and that the defeasance was noticed at Baldwin's request; but Powell admitted, that fearing he might be accountable to Rouse for the overplus, beyond what was due to Baldwin, he made Baldwin covenant that 4400*l.* was due, and he afterwards, on taking advice, retained 1300*l.* as an

indemnity, and he offered to pay the 1300*l.*; and submitted that Rouse or Baldwin should redeem. It does not seem that any further proceedings took place until 1729, when a bill for redemption was filed by a second mortgagee, and the daughter and heir of Rouse, and Powell insisted he had an absolute estate, not redeemable under the power of sale, and cited Bonham *v.* Newcomb (*d*), (which was clearly not in point, and the decision on which is, in the argument in Croft *v.* Powell, placed on the wrong ground;) and insisted on the effect of the fine, and on Rouse's consent to the sale, and on more than twenty years' possession since the mortgage to Baldwin; and that the exception of the defeasance, and the covenant by Baldwin that 4400*l.* was due, was a prudent caution, since Baldwin might possibly be accountable for the overplus, if he had sold for more than was due to him. It was on the other hand argued, and so decided, that the estate was redeemable at any time while in the hands of Baldwin; *that though Baldwin had a power, on nonpayment of the money within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he had done, and it was manifest it was not Baldwin's intention to give Powell an absolute and indefeasible estate, for it was not conveyed to him absolutely, and free from the equity of redemption.* Besides, the bill filed by Powell in 1719, shewed he was conscious he had a redeemable estate, as also his re-

(*d*) *Supra.*

taining the 1300*l.* as an indemnity; that Baldwin presenting to the benefice would not help the case, for he had the legal estate, and had *at law* a right to present, and it did not appear but he might have presented on the nomination of Rouse; and that as to the fine it only confirmed the estate *in statu quo.* And lastly, that the length of time was in that case of little weight, for that although Lord Nottingham did look upon the statute of limitations as a proper rule to determine the time of redemption, yet that had in many cases been varied from, and no certain rule in point of time had been fixed upon; and in the principal case the conveyance to Powell was in 1716, and he preferred his bill in 1719, and the bill by the present plaintiff was in 1729, so that twenty years had not elapsed; and redemption was decreed.

Now it is manifest that so far was the aforegoing case from raising considerable doubt of the validity of the powers for sale in question, that, on the contrary, *in express terms it admits their validity,* and the real question in Croft *v.* Powell was, whether it was a sale or a transfer; and it was manifestly the latter. The arguments drawn from the fine levied to Baldwin and his presentation to the benefice were untenable; and the exception of the defeazance, Baldwin's covenant for the amount of the mortgagee's debt, the reservation of the 1300*l.* and the bill filed by Powell, were unanswerable objections to the plea of its being an absolute purchase.

Consequently, had these powers for sale stood on no better authority than the case of Croft *v.*

Powell, it may be thought there was little hazard in a reliance on them. They have since received express judicial decisions in their favour; the first is the case of Clay *v.* Sharpe (*e*). Wardell assigned leasehold premises to Day in trust for Sharpe, subject to redemption on retransfer of 2000*l.* stock, and it was agreed that if default was made in the retransfer, it should be lawful for Day to sell, and out of the purchase-monies reimburse himself his costs, and repurchase the 2000*l.* stock, and that he should pay the overplus to Wardell, *and Wardell covenanted to concur in the sale.* But it was provided that his concurrence should not be necessary to perfect the title, being intended only as a further satisfaction to the purchaser. Default being made in payment of the mortgage-monies, Day, by Sharpe's directions, put up the mortgage premises for sale, and Clay became the purchaser. Clay's attorney prepared the assignment, and made Day, Sharpe, and Wardell parties. Wardell refused to execute, on which Clay filed his bill for specific performance against the three parties. Wardell in his answer alleged, that he resisted the sale, as having been made without his consent, and at an under-value. He afterwards became bankrupt, and a supplementary bill was filed by Clay against his assignees. On hearing the cause the Chancellor dismissed the plaintiff's bills as against Wardell and his assignees *with costs,* and decreed

(*e*) Clay v. Sharpe, 18 Ves. 346, note; Sugden's V. and P. Appendix 14, 8th edit.

that the agreement entered into by the plaintiff with Day and Sharpe for purchase of the premises should be carried into execution, and on the plaintiff's paying to Sharpe and Day, the residue of the purchase-money, they should execute an assignment to the plaintiff, and that Sharpe and Day should pay the plaintiff's costs, so far as the bills were not dismissed.

The second is the case of Corder *v.* Morgan (*f*), in which the circumstances were almost precisely the same as in Clay *v.* Sharpe, at least so far as respected the language of the power of sale, and the bankruptcy of the mortgagor; but there was this difference between the cases, that in Clay *v.* Sharpe the purchaser was the plaintiff, and in Corder *v.* Morgan, he was the defendant, and the mortgagee the plaintiff. The defendant in the latter case submitted that the plaintiff was bound to procure the concurrence of the mortgagor and his assignees in the conveyance (*g*). The Master of the Rolls said, his opinion was, that the clause in the mortgage deed empowering the plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was

(*f*) Corder *v.* Morgan, 18 Ves. Jun. 344.

(*g*) The defendant in this case seems to have relied on one of the arguments used in Croft *v.* Powell, (*supra*,) viz. "that it was inconceivable, if Powell had expected an absolute estate, that he would not have insisted on Rouse joining in the conveyance,"—and on an opinion expressed by Lord Kenyon, in the King *v.* The Inhabitants of Edington, 1 East, 288, that a Court of Equity would controul the exercise of a power of sale given to the mortgagee.

a mere contract between the mortgagor and mortgagee, to the benefit of which, the defendant as a purchaser was not entitled; and there was nothing in the nature of the contract between the plaintiff and his mortgagor which prevented the latter giving, and the former exercising such a power of sale as that upon which the present question arose. He therefore decreed specific performance, but he did did not think it a case for costs, as the case of Clay *v.* Sharpe was not in print.

These decisions have established the validity of these powers for sale; they also shew that the concurrence of the mortgagor cannot be required by *a purchaser*, although there be an express covenant on his part to join in the sale, and that a bill filed by *a purchaser* to compel the mortgagor to concur in the conveyance will be dismissed with costs; it may be also concluded from the case of Corder *v.* Morgan, that if a purchaser shall hereafter refuse to complete his sale by reason of the mortgagor not concurring in it, and a bill is filed against him by the mortgagee for specific performance, it will be decreed against him *with costs*.

If the power of sale be vested in a trustee, the Court will, it seems, grant an injunction against proceeding to a sale, if reasonable notice of the intended sale is not given to the mortgagor, the trustee being bound to attend to the interests of both parties (*h*). And if the trust for sale be confined to the

(*h*) Anon. 6 Madd. 10.

trustee *and his heir*, a sale by his assign will not be authorized (*i*).

If the surplus produce of the sale be directed to be paid to the executors or administrators of the mortgagor, and the sale is made in his lifetime, it will be personal estate; but if not made until after his death, it will be real estate, and belong to the heir (*k*).

(*i*) Bradford *v.* Belfield, 2 Sim. 264.
(*k*) Wright *v.* Rose, 2 Sim. & Stu. 323.

CHAPTER VI.

OF MORTGAGES UNDER TRUST TERMS, TO RAISE PORTIONS AND MAINTENANCE.

In all well drawn modern settlements and wills, where portions are intended to be provided, care is taken to express the time when the portions shall *vest*, the time when they shall be *payable*, and (if they are charged on real estate) the rate of interest they shall carry from the time they become *payable* until they are raised, with provisoes that the trustees may after the deaths of the tenants for life, or in their lifetime if they shall direct, raise any part of the portions for the advancement of the children, and shall after the deaths of the tenants for life, and until the portions are payable, raise certain sums for maintenance, not exceeding the amount of interest on the principal of the portion, and that the trustees shall not mortgage or sell until some one of the portions becomes payable. By these precautionary provisions, the questions which formerly so much perplexed the Courts in respect to the raising and payment of portions and maintenance rarely occur. But as the points may still arise under settlements and wills unskilfully penned, it will be proper to give the decided cases on this matter our consideration.

The doctrine to which we are about to advert was established on the principle of *convenience*, which is

not always the safest ground on which to rest judicial decisions; and it is singular that in the instance now under our consideration, the doctrine which was originally grounded on convenience, contrary, in some instances to the literal interpretation of the trust, was ultimately found in its application so extremely inconvenient and even ruinous to the estate, that later judges, although feeling themselves bound by the earlier decisions, have nevertheless taken advantage of apparently very trifling circumstances to free themselves from the difficulty.

The doctrine in question seems to be laid down with sufficient accuracy by Lord Chancellor Cowper, in Corbet *v.* Maidwell (*a*), that is, "first, that though a term is limited in remainder to commence after the death of the father, yet if the trust is to raise a portion *payable* at eighteen or day of marriage, without doubt the daughter shall not wait the death of her father, but at the age of eighteen or marriage may compel a sale of the term; secondly, so it is if the trust of a term for raising daughters' portions be limited to take effect, in case the father dies without issue male by his wife, and the wife die without issue male leaving a daughter; in such case the term is saleable in the life of the father."

The first of these propositions is supported by the case of Heyter *v.* Jones (*b*), which was decreed by the Lords Commissioners, the 14th November, 10

(*a*) Corbet v. Maidwell, 1 Salk. 159.

(*b*) Heyter v. Jones, 3 Rep. in Cha. 106.

Will. III., and afterwards affirmed by their Lordships, upon a rehearing, and ultimately affirmed on appeal to the House of Lords. Lands were limited to father and mother for their lives, and afterwards in trust that the trustees, after the decease of the parents, should out of the rents and profits, or by fines, raise 4000*l.* for the portions of younger children to be *paid* at twenty-one, unless the next heir should within one year after the said portions became payable, pay or secure the same. The father died leaving issue a son and several younger children. One of the daughters attained twenty-one in her mother's lifetime; and it was decreed that she was entitled to her portion with interest from the time she attained twenty-one (*c*).

(*c*) This case is reported in Equity Ca. Ab., vol. 1. 337, under the name of Hellier *v.* Jones, and it is there stated that the estate was limited to the father and mother for their lives, with remainder to their first and other sons in tail male, *with remainder* to trustees for 200 years upon trust *after the death of the father and mother*, out of the rents and profits to raise 4000*l.* for portions for younger children at their age of twenty-one years, unless the person in remainder should raise and pay the same; and that the term was ordered to be sold and the portions raised in the lifetime of the father and mother. If this be an accurate account of the limitations, the Court must have transposed the term of years and placed it prior to the limitation to the sons, which in fact seems to have been the intent, from the circumstance of the raising of the portions not being made to depend on the contingency of a failure of issue male; so that the Court must have read the limitations as if they had run thus:—to the father and mother for their lives, with remainder to trustees for 200 years upon trust, to raise portions for younger children, payable at twenty-one, with remainder to first and other sons in tail male. The case, however, is very loosely stated, both in Equity Ca. Ab. and in the Reports in Chancery.

The second of these propositions seems to have received judicial sanction for the first time in the case of Greaves *v.* Mattison (*d*), which was decided in a case at Common Law (*e*). An estate was settled on A. for life, with remainder to his sons successively in tail male, remainder to trustees for forty years, upon trust *if A. should die without issue male of his body begotten on his wife*, then out of the rents and profits of the lands, or by demising, letting or setting the same, to raise portions for daughters, that is, if but one, 5000*l.*, and if two or more 6000*l.*, to be equally divided between them, and to be *paid* them respectively at twenty-one or *marriage*, with benefit of survivorship and with provision for maintenance in the meantime. The wife of A. died, leaving two daughters and no son; one of the daughters died an infant; the surviving daughter married in the father's lifetime, and the question was, what portion she should have; and it was resolved by three of the judges, Pemberton, Dolben and Raymond, first, that the interest and right to the portions was *vested* in the daughters by the death of their mother without issue male, and should not wait the death of the father; secondly, that the trustees, after the death of the mother and in the life of the father, might have sold their interest in the term (although it could not take effect as to the possession of the lands to them or their vendee during the father's life) for

(*d*) Greaves *v.* Mattison, Sir T. Jones, 201.

(*e*) This question arose on an action of trespass, for taking away the plaintiff's daughter.

raising the maintenance or payment of the portion, if any daughter should in the lifetime of the father attain to the age of twenty-one, or be married; and in their opinion the intent of the words should be taken to be, that after the death of the mother, the daughters should be provided with maintenance and portions certainly, and not wait the death of their father, who perhaps might marry another wife, (as here the father had done,) and would not have such a respect for the daughters of the deceased wife as he ought, or he might live so long that the daughters would not have their portions to keep them in any competent time; and, thirdly, that the interest of the portions being vested in the daughters by the mother's death, the two daughters by the express words of the deed ought to have 6000*l.* between them, and by as express words, by the death of one of them, the survivor was entitled to the whole 6000*l.* To this decision, Jones, Justice, did not assent, but gave his opinion that the right to the portions did not vest in the lifetime of the father, and that the 6000*l.* was not intended to be raised unless there were two daughters living at the father's death; and, secondly, though he agreed the term might be sold in the father's lifetime, yet he thought that it was not intended by the parties that such a sale should be made; for the first intention was that the money should be raised out of the rents, issues and profits, which could not be done by the trustees during the father's life; and the execution of the trust as to demising, letting or setting seemed to be intended only when they should have power to take the rents, issues and profits; and as to the argument of the

possibility of neglect by the father, and therefore the care of that was put in the hands of the trustees, he thought if such had been intended, an express power ought to have been given for such purpose, for the law would never suppose that the father, against the obligation of nature, would neglect to make a competent provision for his daughters, and, therefore would not make a construction to compel him to it of words expressing no such thing and against the proper sense of them. And he added, that another (*i. e.* different) construction would be too great an encouragement to disobedience in the daughters, and to ruin themselves by mean marriages: he therefore thought the surviving daughter entitled to 5000*l.* only.

The arguments of the Court in this case have been rather diffusely stated, as the case forms the foundation of this branch of the doctrine in question, and the arguments advanced *pro et contra* were, with no great variation or addition, followed in the greater part of the subsequent cases.

There is also a case in Vernon's Reports, heard before the Lord Keeper, in Hilary Term, 1703, which is generally considered as a strong authority for the same doctrine (*f*). But the reference made by the editor of the last edition to the register's book, shews that this case was attended with such considerable evidence of intention that the portions should be raised in the lifetime of the surviving parent, that it can hardly be considered as an au-

(*f*) Gerrard *v.* Gerrard, 2 Vern. 458.

thority for the general doctrine we are referring to. The principal points in that case were;—lands were settled on Sir Charles Gerrard for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail; but if Sir Charles should die without issue male, having one or more daughters, then to trustees for 500 years, in trust, by the rents and profits or by mortgage, to raise 5000*l.*, if but one daughter, to be *paid* at twenty-one or marriage, which should first happen next after the decease of Sir Charles and wife, *or within six months after either of those days or times* (i. e. *twenty-one or marriage*), so as such daughter did not marry before eighteen without the consent of one of her *parents*, or grand parents, if any of them should be living; provided that if *Sir Charles*, or any other person entitled to the inheritance, paid or secured the portion to such daughter *at the time aforesaid*, the term should be surrendered. Sir Charles died without issue male, leaving one daughter, who attained twenty-one in her mother's lifetime; and the question being whether the portion should be raised in the mother's life-time, it was decreed accordingly, with interest from the filing of the bill.

It will be observed, that in this case it was provided at the time of the settlement, that if *the father* paid the portion on the marriage, the term should cease. It might be, therefore, considered to be the intention of the parties that the portions should be then payable, or at least it was a fair inference, united with the previous provision for the payment within

six months after twenty-one or marriage with the consent of one of the *parents*.

The case of Staniforth *v.* Staniforth, heard in the same term before the Master of the Rolls, was however directly in point (*g*). In that case lands were limited to the father for life, remainder to the wife for life, and the heirs male of their bodies begotten; and if it should happen there should be no issue male of the marriage, and one or more daughter or daughters, then to trustees for 500 years, from the decease of the survivor, upon trust by sale or mortgage to raise portions; but no time was appointed for payment of them, nor was there any provision for maintenance. There was no issue male of the marriage, and the father died leaving only one daughter. On bill filed by the daughter, the Master of the Rolls declared, that by the consequence of the father's death without issue male, leaving a daughter, the term arose, though not to take effect in point of profits until after the death of the mother, and that the portion *vested* in the daughter in the lifetime of the mother; and that no time being appointed for the payment of portions, nor any maintenance in the mean time, she was entitled to a reasonable maintenance, not exceeding the interest of her portion, from the death of her father, or at least from such time as the portion might have been raised by a sale; and he accordingly decreed the portion to be raised by a sale, with a reasonable maintenance in the mean time.

(*g*) Staniforth v. Staniforth, 2 Vern. 460.

Thus far the doctrine laid down in Greaves *v.* Mattison seems to have proceeded without interruption; but it was discovered that the prejudicial consequences extended much beyond what was contemplated even by Jones, in his objections to the decision in Greaves *v.* Mattison. For if the portions were ordered to be raised by *sale* of the reversionary term, it was evident that the interests of the remainder-man or reversioner might, in case the property was not of great value, be totally sacrificed to the raising of the portions, and even if the property was considerable, still the injury done to the estate might be to a very serious extent. If the portions were ordered to be raised by *mortgage* of the reversionary term, then the estate of the tenant for life must be encroached upon to satisfy the accruing interest of the mortgage, contrary to the intent, and, in many cases, the express wording of the settlement, or the only alternative was that the interest should run in arrear; and as in such latter case the mortgagee might file his bill in equity, and by procuring rests to be taken, convert interest into principal, it was clear that if the tenant for life lived many years, the interest might double or even treble the principal, and by such means prove the total ruin of the estate.

Evils so serious as these led at length to a decided disapprobation of the rule laid down in the preceding cases, and judges became anxious to discover circumstances which would justify them in departing from it. Thus, if a particular time is appointed for the raising of the portions, such as "*after*

the commencement of the term" (*h*) or the like, that circumstance has been held to *imply a negative*, that the portions should not be raised at any other time. It has been also held, that the circumstance of the maintenance being directed to be raised out of the rents and profits after the term has fallen *into possession* (*i*), is sufficient to shew that the portion shall not be raised before that period, on the ground that the maintenance must precede the portion, and that it would be absurd to raise the portion first and the maintenance afterwards. The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should *in the mean time*, until the portions became payable, be received by the persons entitled to *the reversion* immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (*k*).

Lord Hardwicke went so far (*l*) as to say, that the Court would lay hold of very small grounds to prevent the raising of the portions in the life of the father and mother; but Lord Talbot (*m*) thought it rather depended on the particular penning of the trust, and agreed with Lord Cowper, that if all the

(*h*) Butler *v.* Duncombe, *infra*.
(*i*) Brome *v.* Berkeley, *infra*.
(*k*) Stephens *v.* Dethick, *infra*.
(*l*) Stanley *v.* Stanley, 1 Atk. 549.
(*m*) Hebblethwaite *v.* Cartwright, Forrest, 31.

contingencies had happened, the portions must be raised. Lord Chancellor Eldon (*n*) has expressed his disapprobation of what fell from Lord Hardwicke, and has given his opinion that the proper rule is that which is stated by Lord Talbot, and that he did not think the Court ought *to be eager* to lay hold of circumstances, but should hold an equal mind while construing the instrument; the latter observation was made by his lordship in answer to a remark of Lord Alvanley in Clinton *v.* Lord Seymour (*o*), viz. that the Court was expressly *eager* to lay hold of circumstances to shew it was not the intention of the parties that the portions should be raised out of the reversionary term. Lord Chancellor Eldon said, "the rule upon the whole depends upon this, whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation of the parent for life, with a term to raise portions at the age of twenty-one or marriage, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, the interest is payable and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term."

The following leading cases, which are chiefly

(*n*) Codrington *v.* Lord Foley, 6 Ves. jun. 380.
(*o*) Clinton *v.* Seymour, 4 Ves. jun. 440.

noticed in the order in which they occurred, will explain the circumstances under which the Courts thought themselves either bound by the rule or enabled to evade it.

The first instance in which a stand was made against the rule was by Lord Chancellor Cowper in the before mentioned case of Corbett *v.* Maidwell.

In that case (*p*), after a limitation to the father for life, an estate was limited to trustees for 500 years, upon trust, if the father should die without issue male by his then intended wife, and there should be one or more daughters of their two bodies, who should be *unmarried or not provided for at the time of his death*, such daughter, if but one, should have 2000*l.*, and 30*l.* *per annum issuing out of the profits* till the portions should become due; the portion to be *payable* at eighteen or day of marriage, and the trustees to raise it by sale or mortgage, or perception of profits. There was one child of the marriage, a daughter, who married the plaintiff, and after the mother's death the plaintiff and wife filed their bill to have the portion raised in the father's lifetime. The Lord Chancellor dismissed the bill, on the ground that all the contingencies had not happened, namely, that the child who could claim the portion must be a daughter *unmarried or unprovided for at the father's death;* and as to the 30*l.* maintenance, it must be

(*p*) Corbett v. Maidwell, Trinity Term, 9 Ann. 1 Salk. 158; 3 Rep. in Cha. 101.

intended in case the father should die without issue male, leaving a daughter under eighteen or not married; because otherwise this absurdity must follow, that the daughter must be paid maintenance money in the lifetime of the father, out of the profits of a term which was not to commence till after his death.

In the case of Savile *v.* Savile (*q*), which was heard before Lord Chancellor Parker, in Trinity Term, 1718, the principle laid down in Greaves *v.* Mattison was again in some degree acted upon; there an estate had been limited to the father for life, with remainder, to the intent that the widow might receive a jointure rent-charge for life, and subject thereto, to trustees for ninety-nine years, determinable on her death, in trust for securing the jointure, and thus charged, to the sons of the marriage in tail, with remainder to trustees for the term of 500 years, upon trust, in default of issue male, to raise portions for daughters, *payable* at sixteen or marriage: the father died without issue male, and his lordship decided that the term of 500 years took place in equity from the death of the father, and that the portions should be raised accordingly.

In this latter case, however, as the term of ninety-nine years was limited for a particular purpose only, and extended only to *part* of the profits, the general doctrine was not strongly brought into question.

(*q*) Savile v. Savile, 1 Pr. Wms. 456.

In a subsequent case his lordship concurred with Lord Chancellor Cowper in expressing his disapprobation of the general rule (*r*). An estate was limited, in pursuance of articles, to the mother for life (the father being then dead, leaving issue only one child, a daughter,) with remainder to trustees for 500 years, upon trust, *from and after the commencement of the term,* by the rents and profits, or by demise, sale or mortgage, to raise 3000*l.* for the daughter's portion, *payable* at twenty-one or marriage; the Lord Chancellor held the words '*from the commencement of the term*' to signify commencement *in possession,* which *implied a negative* that it should not be raised before; and that although the portion was directed to be paid at twenty-one or marriage, yet it was a rule in law and equity to construe the whole deed so that every clause should have its effect, and he decreed that the portion in this case was vested, but should not carry interest till the term should commence, *for all interest was in default of payment.*

The case of Sandys *v.* Sandys was heard before Lord Macclesfield, in Trinity Term, 1721 (*s*), in which the estate was limited (subject to preceding life estates in the husband and wife, and to a limitation to the issue male of the marriage,) to trustees for 500 years, upon trust by sale or mortgage, or out of the rents and profits, to raise portions to be *paid* at twenty-one or marriage. One of the daughters (after

(*r*) Butler *v.* Duncombe, 1 Pr. Wms. 448.
(*s*) Sandys *v.* Sandys, 1 Pr. Wms. 707.

her mother's death without issue male) having married, filed her bill in her father's lifetime to have her portion raised. The Lord Chancellor, after remarking that the selling or mortgaging reversions seemed a great hardship, being in effect to ruin a family for the raising the daughters' portions, and therefore he would not go one step further than precedents should force—at length, *animo reluctante*, decreed the portion to be raised with interest from the marriage.

But his lordship soon afterwards took occasion to shew how adverse he was to the general doctrine, and how willing to escape from it on any reasonable ground (*t*). An estate was limited to the husband and wife successively for life, with remainder to the sons of the marriage in tail male, with remainder to trustees for a term of years, to commence on failure of issue male of the marriage, upon trust by the rents and profits, or by sale or mortgage, to raise portions for daughters, to be *paid* at the age of eighteen or marriage, or within as short a time after as *conveniently might be;* and for the maintenance of such daughters, and until their portions should be raised, a yearly sum was to be paid for maintenance, payable half-yearly at Michaelmas and Lady day, and the first payment to be made on such of the said feasts as should happen *next after the death of the father*, it being the intent of the parties that no such yearly maintenance should be paid during the father's life;

(*t*) Reresby *v.* Newland, 2 Pr. Wms. 94.

with a proviso, that if the father should die without any daughter *living at his decease,* the term should be void; and power was reserved to the father, with the consent of the trustees, to revoke all the uses. The mother died, leaving one child, a daughter, who married the plaintiff, and with her husband filed her bill for raising the portion in her father's lifetime. The Lord Chancellor held the portion could not be *conveniently* raised in the father's lifetime; for by selling the reversion, the family might be inconvenienced to that degree as to ruin the estate; besides there was a proviso in the settlement, making the portion contingent during the father's lifetime, namely, if the father died without any daughter living at his decease, the portion was not to be raised; and the father had a power of revocation with the consent of the trustees, which suspended and prevented the portions from being payable; and he decreed the portion could not be raised during the father's life.

The case of Brome *v.* Berkeley, which was heard before Lord Chancellor King, with the assistance of the Master of the Rolls, is particularly worthy of attention (*u*): The estate was limited to father and mother for life, and to their sons in tail male, with remainder to trustees in fee, upon trust, if there should be no son of the marriage, or being such, if all should die under twenty-one without issue, then out of the rents and profits, or by sale or leasing, or otherwise, to raise portions for the daughters of the

(*u*) Brome *v.* Berkeley, 2 Pr. Wms. 484.

marriage, payable at twenty-one or marriage; and also to raise a certain yearly sum, by half-yearly payments, for their maintenance and education; the *first payment* of the maintenance money to be made at such of the half-yearly feasts as should happen next after the said estate so limited to the trustees should take effect *in possession*. There was one child of the marriage, a daughter, who, after the death of her father, having attained twenty-one, filed her bill in her mother's lifetime against the trustees for raising the portion with interest from the time the same became payable. The Master of the Rolls, after admitting that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless in the declaration of the trust of the term the intention of the parties appears to the contrary, said, that in the principal case such intention was plain, for in that case *the maintenance* for the daughter was not to be paid until the trust estate came *into possession*, and the payment of maintenance must be intended to *precede* the payment of the portion; the maintenance must determine when the portion becomes payable: In this opinion the Lord Chancellor coincided, adding, that it was absurd to say the portions should be raised first, and the maintenance money paid afterwards. The bill was accordingly dismissed, and the decree affirmed in the House of Lords.

In a subsequent case (*x*), Lord Chancellor King

(*x*) Goodal *v.* Rivers, Moseley, Rep. 395.

considered himself bound by the general rule. In that case the estate was limited to Sir George Rivers for life, with remainder to Dame Dorothy his wife for her jointure, with remainder to the first and other sons of the marriage in tail male, with remainder to trustees for 500 years, upon trust, in default of issue male of the marriage, out of the rents and profits after the commencement of the term, or by demising, selling, mortgaging or otherwise disposing of the premises, when and in such manner as the trustees should think fit, to levy and raise the sums after mentioned, for the portions and maintenance of daughters, if one only should attain the age of nineteen or marry, 4000*l.*; if two, 5000*l.*; if three or more, 6000*l.*; to be equally divided between them, with certain yearly sums for their maintenance and education from the death of Sir George *or* Dame Dorothy, which should first happen, till such portions should be paid, and the portions to be *paid* to the daughters at twenty-one or marriage or as soon after as they could be raised, and the said yearly sums for maintenance to be paid from the death of Sir George *or* Dame Dorothy, which should first happen, till the portions became payable, with a provision, that if Sir George survived his wife, and sufficiently maintained his daughters to the approbation of the trustees until they attained the age of fourteen, no maintenance should be raised until that time, and with a proviso, that the power given to the trustees of selling or mortgaging should not prejudice the life estate of the wife, which latter proviso the Solicitor General afterwards in his argument observed arose from abundant caution. Dame Dorothy died in the

lifetime of Sir George, leaving issue two sons and several daughters. The two sons afterwards died without issue: at the time of the death of the surviving son, all the daughters had attained to the age of nineteen. The daughters after this filed their bill against their father and the trustees to have their portions raised by sale of the term, with interest from the death of their last surviving brother. It was argued by the Attorney and Solicitor-General for the plaintiffs, that this case was distinguished from that of Brome and Berkeley, inasmuch as in the present case the maintenance was to be raised after the death of either father or mother, until the daughters attained nineteen or marriage, and therefore was not within the objection made in the former case, namely, that the portions would precede the maintenance; nor was it within the case of Butler *v.* Duncombe, because in that case the words "*after the commencement of the term*" introduced the declaration of the trust, but in the present case "*the failure of issue male*" introduced the trust. In this the Lord Chancellor coincided, and he held that the words, "*when and in such manner,*" (which it had been urged for the defendant gave a great latitude to the trustees, and left the convenience of time to them,) only signifying that the estate should be sold either together or in parcels, as the trustees should think fit; and he decreed that the portions should be raised with interest from the death of the surviving brother by sale of the reversion.

In Hebblethwaite *v.* Cartwright (*y*) Lord Chan-

(*y*) Hebblethwaite *v.* Cartwright, For. 30, Easter term, 1734.

cellor Talbot placed the doctrine entirely on the ground of *apparent intention* and on the particular penning of the trust: which ground has been since strongly approved of by Lord Chancellor Eldon, as before remarked. In that case an estate was limited to A. for life, remainder to his first and other sons by B. his wife, in tail male, remainder to trustees for 1000 years, upon trust, if there should be no issue male of the marriage who should live to attain twenty-one or be married and have issue, then out of the rents and profits, *or* by sale or mortgage, to raise portions for daughters, to be divided between them at twenty-one or marriage, and a yearly sum for maintenance in the meantime; with a proviso, that if the father or the remainder-man should advance them in marriage with portions equivalent, or there should be no daughter who should attain twenty-one or be married, then the term to cease. The wife died without issue male, leaving three daughters. One question made in the cause was, whether under the trusts of the term the portions were to be raised in their father's lifetime; and in support of the negative, it was ingeniously urged that the option given to the trustees of raising the portions out of the rents and profits, *or* by sale or mortgage, required that the death of the father should precede the raising of the portions. But the Lord Chancellor held, that since they had both powers, they might use that which best suited the interest of the daughters; nor did he conceive the proviso respecting advancement any evidence of intention to postpone the raising of the portions; and he decreed the portions to be raised, with interest

from the mother's death, at which time they first vested.

The case of Stanley *v.* Stanley, heard before Lord Chancellor Hardwicke (*z*), is very briefly reported, and the grounds of the decision are not mentioned. But it seems that his Lordship, after stating the general rule, decided against the claim of the daughters to have their portions raised in the lifetime of their parent.

In Hall *v.* Carter (*a*), heard before Lord Hardwicke in July, 1742, the Lord Chancellor maintained the general doctrine. In that case an estate stood limited (subject to the widow's jointure) to trustees for 100 years, upon trust out of the rents or profits, or by mortgage, to raise portions for daughters at eighteen or marriage, and to pay to every daughter 6*l.* for maintenance. The like argument was used in this case as in Hebblethwaite *v.* Cartwright, viz. that the option vested in the trustees of raising the portions either out of the rents and profits *or* by mortgage, evinced the intention that they should not exercise their election until the term came into *possession;* and it was also contended, that the raising of maintenances out of the rents and profits brought it within the case of Brome *v.* Berkeley. As to the first objection, viz. the right of election, the Lord Chancellor held they should not be allowed to post-

(*z*) Stanley *v.* Stanley, 1 Atk. 548.
(*a*) Hall *v.* Carter, 2 Atk. 355.

pone the raising of the portions in order to make their election; and as to the second objection, he distinguished the case of Brome *v.* Berkeley, by observing that in the latter case the daughters were not to have maintenance until the term came into possession, while in the principal case the maintenance was *a subsisting charge*, the arrears of which must be paid when the estate came into possession. And he decreed accordingly, and that the portions should carry interest from the time they became due.

In a subsequent case (*b*), however, Lord Hardwicke thought himself justified in departing from the general rule. An estate was settled upon parents for life, and to their sons in tail male, with remainder to trustees for a term of years to raise portions for daughters, to be paid at twenty-one or marriage; and the daughters out of the premises to have such yearly maintenance as should be suitable to their degree and quality, and the residues of such yearly rents, above such yearly maintenance, *in the meantime*, till the portions became payable, to be received by such persons as should be entitled to the reversion immediately expectant on the determination of the term. The Lord Chancellor applied the case of Brome *v.* Berkeley to the principal case, and dismissed the bill.

Notwithstanding the doctrine laid down in Brome

(*b*) Stevens *v.* Dethick, 3 Atk. 39.

v. Berkeley, that the *maintenance* must determine when the portions shall become payable, Lord Hardwicke, in Lyon *v.* Chandos (*c*), determined, that the payment of maintenance could not operate to postpone the raising of the portions in the face of a clear and express declaration. And therefore in that case, although the maintenance was directed not to be raised, until *after the death of the Duke of Chandos*, yet as the raising of the portions was expressly declared to be " at twenty-one or marriage, the Marquis of Carnarvon being dead," he refused to admit the implication arising from the time of the commencement of the maintenance against the absolute and clear declaration of the time for payment of the portions, and directed them to be raised with interest from the death of the Marquis. And although the Master of the Rolls, in Clinton *v.* Seymour (*d*), is reported to have considered the order for payment of interest from the death of the Marquis singular, as the maintenance could not be raised until the death of the Duke; yet it is apprehended the decree was in consistency with the preceding decisions, which *directed* interest to be raised from the time the portion became payable, without reference to the raising of maintenance.

The case of Churchman *v.* Harvey, heard before Lords Commissioners Willes and Wilmot (*e*), was the same in effect as Butler *v.* Duncombe, the lan-

(*c*) Lyon *v.* Chandos, 3 Atk. 416.
(*d*) Clinton *v.* Seymour, 4 Ves. jun. 464.
(*e*) Churchman *v.* Harvey, Amb. 335.

guage of the trust being that the trustees should at any time from and after the *commencement of the term in possession* raise the portions; and was decided in like manner.

In Smith *v.* Evans, heard before Lord Chancellor Northington in Michaelmas term 1766 (*f*), the estate was settled to the father and mother and their issue male in strict settlement, with remainder to trustees for a term of years, upon trust, if the father should die without issue male and leaving one or more daughters living at his death, then to raise portions by leasing, assigning or mortgaging. The father died without issue male, leaving his widow and two daughters, who filed their bill to have their portions raised in their mother's lifetime. It is singular that his Lordship in giving judgment should incline to favour the general rule before alluded to, and to disapprove of the reasons which induced the Court to make the decisions which are exceptions to it, saying that the inconvenience of a younger child starving for want of his portion was as great as the injuring of the estate of the eldest son by raising the portion out of the reversion; and it being urged that by leasing was meant at rack rent, and therefore the case resembled the case of Brome *v.* Berkeley, he declared he could not understand it in that sense, and would not construe it so unless he was compelled; it meant leasing upon fine, and he decreed

(*f*) Smith *v.* Evans, Amb. 633.

the portion to be raised with interest from the filing of the bill.

The case of Conway *v.* Conway was heard before Lord Chancellor Thurlow (*g*), and is an extraordinary judgment. It has been shewn that by the preceding cases the general rule is, that the portions when they are *vested*, and are directed to be *paid* at a given time, shall be raiseable out of a reversionary term, unless an intention is shewn that the payment shall be postponed until the term comes into possession; and that the evidence of such an intention is an exception to the rule. But in Conway *v.* Conway, the Lord Chancellor is made exactly to reverse the rule, and to say that when a man gives portions charged on a term to arise on the death of a party, it shews that they are not to be paid till after the death of the party; and that though they are directed to be paid upon attaining twenty-one or marriage, yet it can only be when the term shall come into existence; but that such an intention could not be raised against express declaration.

In Codrington *v.* Lord Foley (*h*) Lord Eldon, after noticing this reported judgment of Lord Thurlow, said, that upon looking at his own brief in that cause, and to other cases, he was satisfied Lord Thurlow never did express himself in the words there attributed to him; and he adds, that doctrine is di-

(*g*) Conway *v.* Conway, 3 B. C. C. 267.
(*h*) Codrington *v.* Lord Foley, *supra*.

rectly contrary to that of Lord Cowper, Lord Hardwicke, and what all the cases, whether proceeding upon sufficient circumstances denoting intention or not, do in effect say, that there must be some circumstances in the will or settlement denoting the intention to take the case out of the general rule, which is, that the portions shall be raised at the days or times limited, unless the will or settlement contain circumstances indicating an intention that they are not to be raised at those days or times.

The case of Codrington *v.* Lord Foley remains to be noticed, which was heard before Lord Eldon (*i*), and which was briefly as follows:—Lord Foley, by his will, devised certain estates to trustees for ninety-nine years, with remainder to Thomas, afterwards Lord Foley, for life, remainder to trustees during his life to preserve contingent remainders, remainder to other trustees for 100 years, for raising a jointure for any wife of Thomas Lord Foley, with remainder to other trustees for 1000 years upon trust, to raise 30,000*l.* for portions for younger children, as Thomas Lord Foley should appoint; and in default of appointment, to be equally divided between them if more than one, share and share alike, with remainders over; and he devised other estates to trustees for 101 years; and subject thereto to uses in favour of his second son Edward, and his issue; and he declared the trusts of the term of 99 years, and 101 years, to be, that the trustees should, out of the

(*i*) Codrington v. Lord Foley, *supra*.

rents and by the sale of timber, allow for the use of his sons Thomas and Edward, any sum not exceeding 6000*l.* a year, until such of their debts as were then provided for, and should be due at his decease, should be discharged; and in the next place, to discharge a mortgage and certain other debts of his two sons, and after the decease of his sons and payment of the debts, &c. to attend the inheritance. Thomas Lord Foley died in 1793, leaving one son and one daughter, who, in 1796, married Christopher Codrington, Esq. The bill was filed by Mr. and Mrs. Codrington and their infant children, against Lord Foley then an infant, and the then trustees of the term of 1000 years, praying an account of principal and interest, and that the same might be raised; it was objected that the trusts of the term of 99 years remained to be performed; and a cross bill was filed which prayed that the trusts of the terms of 99 years and 101 years should be satisfied before those of the term of 1000 years should be executed. The Lord Chancellor after stating, as before mentioned, that the rule depends upon this, whether the parties to the instrument, attending to the whole of it, intended that the portions should or should not be raised, distinguished the principal case from all the preceding cases, viz. that this was not attempted to be *raised with any prejudice to the life estate of the parent* (*k*), and he decreed that the plaintiff was en-

(*k*) It would not seem from the preceding cases, that the raising of the portion by mortgage or sale of the reversionary term prejudiced the life estate of the parent; the prejudice was in fact to the estate of the remainder-man, by the accumulation of interest upon

titled to have the portion raised with interest at 4*l. per cent.* from the marriage to the filing of the bill, and interest at 5*l. per cent.* from the filing of the bill, but gave no costs.

Having thus gone through the leading cases on this head, it remains to be noticed, that if, as is usual in modern settlements, the trusts are by sale or mortgage to raise the portions after the parent's death, or in his lifetime, if he shall so direct; and if the parent is willing that the portion shall be raised by mortgage *in his lifetime;* or if the term has fallen into possession; the usual mode of raising the portion is, that the child shall assign to the mortgagee his share of the sums to be raised, and give the mortgagee a power of attorney to receive it. Then the tenant for life, if the term is reversionary, makes a demise of a proportional part of the estate to the mortgagee for 99 years, if the tenant for life shall so long live, upon trust to permit the tenant for life to receive the rents until default is made in payment of the interest, and then to receive the rents and retain the interest. The trustees of the term assign a proportional part of the premises comprised in the term to the mortgagee, and there is

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interest. In Hall *v.* Carter, *supra*, Lord Hardwicke is reported to have said, that in more modern cases, the Court has thought it very hard in the lifetime of the father to encumber his estate with raising daughters' portions; but he immediately afterwards remarks, that the estate of the *jointress* could not be affected by the mortgage of a reversionary term. These observations would tend to infer that a distinction has been taken between the cases of the father being tenant for life and any other person. But the author has not been able to discover an authority for it.

introduced a proviso for redemption by the tenant for life, or persons in remainder, on payment of the portion and costs, &c. The tenant for life, or (if the term is in possession) the remainder-man (if he will concur) covenants for the payment of the money and for the title.

Where an annual sum is directed to be raised for *maintenance*, and there is an existing life estate, and it is not clearly expressed that the maintenance is not to commence until after the determination of that estate, the question of intention arises as in the case of the portion itself. If it is ascertained to be the intention that the maintenance shall commence notwithstanding the life estate, but the payment of it is clearly confined to be out of *annual profits*, it must from necessity either encroach on the life estate, or run in arrear; the former can never be considered the intention, as the term is reversionary to the estate; the maintenance must therefore run in arrear, and when the trust term falls into possession all the arrears must be paid (*l*). If the trusts for raising the portion and maintenance are extended to *sale or mortgage*, it was for some time considered doubtful whether the Court would raise the *maintenance* by way of mortgage, for it is manifest there is some difficulty in accomplishing it, inasmuch as the maintenance is a running sum becoming due quarterly or half-yearly; and in Pierpoint *v.* Lord Cheyney (*m*), Lord Chancellor Parker said he had

(*l*) Ravenhill *v.* Dansey, 2 P. Wms. 179.
(*m*) 1 P. Wms. 483.

not been enabled to find a single precedent for mortgaging a reversion for maintenance; but in the subsequent case of Ravenhill *v.* Dansey (*n*), Lord Chancellor Macclesfield considered it clear, that when the child had no other maintenance, it had been decreed to be raised by mortgage of the reversionary interest of a term; and in a recent case (*o*) the Master of the Rolls admitted the maintenance might, if necessary, be raised by sale or mortgage (*o*).

In a case heard before Lord Alvanley (*p*), an estate was limited to the use of the Duke of Newcastle for life, with the remainder to trustees for 1000 years, with remainder to the Earl of Lincoln for life; and the trusts of the term of 1000 years were by mortgage or sale, or out of the rents and profits, to raise 15,000*l.* for an only daughter of the Earl, payable at such time as he should appoint; and in default of appointment, to be a vested interest at twenty-one or marriage, but not to be *payable till after the death of the survivor of the Duke and Earl*, and to carry interest at 4*l. per cent.* from the death of the survivor, and there was a proviso that no sale or mortgage should be made until some one of the portions became payable, and upon further trust, *after the death of the Earl*, to raise by all or any of the ways and means aforesaid, for the maintenance of the younger children until their portions should be payable, such

(*n*) *Ubi supra.*

(*o*) Lyddon *v.* Lyddon, 14 Ves. jun. 558.

(*p*) Lady Clinton *v.* Lord Robert Seymour, 4 Ves. jun. 440.

yearly sums not exceeding the interest of the portions, as the Earl should appoint; and in default of such appointment, then such yearly sums as would be equivalent to the interest by quarterly payments, and the *first payment* to be made on such of the usual feast days as should happen next *after the death of the Earl,* and the surplus of the rents and profits to be paid to the person for the time being entitled to the *reversion or remainder* expectant on the determination of the term. The Earl of Lincoln died in 1788, leaving only one younger child, a daughter, and without executing any appointment of a yearly sum for maintenance. The Duke, after the death of the Earl, paid the Countess Dowager of Lincoln the yearly sum of 400*l.* for the maintenance of the child. The Duke died in 1794. Lady Catherine Clinton, the daughter, on attaining twenty-one in 1797, prayed an account of interest *from the death of her father the Earl.* On the other side it was contended that no interest accrued due until the death of the *Duke.* The Master of the Rolls, in giving judgment, said, that taking the words of the maintenance clause by themselves, he should have no hesitation in saying, that the daughter was entitled to maintenance from the death of her father during the life of her grandfather, but that it was now perfectly settled, that the Court would lay hold of any words from which it could be fairly inferred it was not the intention to charge the reversionary term in that manner, and the question then was, whether the succeeding words, upon which he chiefly relied, did not amount to demonstration, that it could not be the intention that on the quarter-day after the death of the Earl, and

each subsequent quarter-day, the plaintiff might come and insist upon having her maintenance raised by sale or mortgage; and after noticing that the maintenance could not have affected the Duke's estate for life, and must have been raised, if at all, out of the reversionary term to arise after his death, and that by express words the power of raising money by sale or mortgage could not be used till one of the portions became payable, he declared that the clause directing that after the maintenance should be raised and paid, the surplus of the rents and profits should, until the portions became payable, be received by the persons for the time being entitled to the premises in reversion or remainder expectant on the determination of the term, appeared demonstration, that the maintenance should be raised out of the *annual profits*, and not by sale or mortgage, and which could not be during the life of the Duke, for the Duke was not a person entitled to the reversion or remainder expectant upon the determination of the term; and he accordingly decreed that the plaintiff was not entitled to interest until the death of the grandfather.

It is important to ascertain under what circumstances the words *rents and profits* will authorize a mortgage, or will be restricted to *annual* rents. By a liberal construction, it has been held, that as the words "rents and profits" in a devise would carry the fee (*q*), so the words "profits of land," when not re-

(*q*) Allan v. Backhouse, 2 Ves. & Bea. 74.

stricted to annual profits, and especially when applied towards the raising of portions or debts, were to be considered as signifying any profits the lands would yield, whether by sale or mortgage or otherwise (*r*). But, according to a more modern doctrine, it seems the *natural* meaning of raising a portion by rents and profits is by the *yearly* profits (*s*), and the cases which have extended it further are *exceptions* out of the general rule in which the context has afforded a different construction (*t*). Thus where a time certain is prefixed for the payment of portions, and it is evident the annual profits will not raise the money within that time, the Court has directed a mortgage (*u*). So also in a case where the trust of a term was out of the rents and profits to raise 8000*l.* for daughters' portions, to be paid them *as soon as conveniently could be*, two points were made:—first, whether the 8000*l.* could be raised by sale or mortgage? and secondly, whether it should carry interest, and from what time? and it was considered, that as the daughters were of age at the time of the father's death, it would be *convenient* to raise the portions forthwith; and it was decreed, that the portions

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(*r*) Lingon *v.* Foley, 2 Ch. Ca. 205; Backhouse *v.* Middleton, 1 Ch. Ca. 173; Gibson *v.* Rogers, Amb. 93; Treat. on Eq. vol. i. 446.

(*s*) Ivy *v.* Gilbert, *infra.*

(*t*) 2 P. Wms. 19; Allan *v.* Backhouse, *supra.*

(*u*) Backhouse *v.* Middleton, *supra; et vide* Heycock *v.* Heycock, 1 Vern. 256; Berry *v.* Askham, 2 Vern. 26; Warburton *v.* Warburton, 2 Vern. 420; Okeden *v.* Okeden, 1 Atk. 552; Green *v.* Belcher, 1 Atk. 505; Shrewsbury *v.* Shrewsbury, 1 Ves. jun, 234; and see 2 Ves. jun. 481, note; and Allan *v.* Backhouse, *supra.*

should be raised by sale or mortgage, and that the 8000*l.* should carry interest from the death of their father (*x*). But equity would not have raised the portions by mortgage if the children had been of tender years at the death of the father (*y*), and in such case the portions would have become due, when the rents would have raised them and would have carried no interest (*z*). As soon as the portions could have been raised by the rents, the land would have borne its burthen and have been discharged (*a*).

If the trust be to raise portions out of rents and profits, and no time is appointed for payment, and the child dies under twenty-one, and unmarried, before it is raised, the portion will in such case be raised out of the annual rents, for the Court will not, it seems, direct a mortgage (*b*).

The several cases already cited shew that the words "rents and profits" when *added or prefixed to more general words* (*as sale or mortgage*) *by way of alternative,* will not restrict the meaning of the more general words (*c*). But if there be a *clear intention,*

(*x*) Trafford *v.* Ashton, 1 P. Wms. 416; *Et vide* Stanhope *v.* Thacker, Prec. Chan. 435.

(*y*) Evelyn *v.* Evelyn, *infra.*

(*z*) Ivy *v.* Gilbert, *infra.* (*a*) Ibid.

(*b*) Earl of Rivers *v.* Earl of Derby, 2 Vern. 72, *et vide* 2 P. Wms. 672.

(*c*) Greaves *v.* Mattison, Gerrard *v.* Gerrard, Sandys *v.* Sandys, Goodall *v.* Rivers, Hebblethwaite *v.* Cartwright, Hall *v.* Carter, *supra.*

shewn that the trust shall be confined to annual rents, the Courts will not in any case order a sale (*d*).

There are also cases in the books which shew that the words "rents and profits" will be restricted to annual rents, when followed or attended by other words which imply that the *money shall not be raised in any other way*, or *when the words "rents and profits" are placed in opposition to the more general words "sale or mortgage.*" Of the latter position the beforementioned case of Corbett *v.* Maidwell (*e*) is an instance where the *maintenance* was directed to be issuing out of the *profits;* and the portion itself to be raised by sale or mortgage or perception of rents and profits. Of the former position, the case of Ivy *v.* Gilbert (*f*) is a strong instance. Roger Pomeroy settled lands to the use of himself for life, with remainder, as to part, to the use of his wife for life, with remainder to his first and other sons in tail male, with remainder to trustees for 120 years, upon trust "out of the rents and profits, as well by leases for one, two, or three lives, or any number of years determinable thereon, or for twenty-one years absolutely at the old rent, to raise 1500*l.* for daughters' portions," with remainder to Roger Pomeroy in fee. There was one only child, a daughter, who married Humphrey Gilbert, the defendant's father. Roger Pomeroy having no issue male, limited the reversion to trustees for ten years, upon trust, if Gilbert and wife should release

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(*d*) Small *v.* Wing, 5 B. P. C. 66, 2d edit.

(*e*) Corbett *v.* Maidwell, *supra.*

(*f*) Ivy *v.* Gilbert, Prec. Chan. 583; 2 P. Wms. 13.

the 1500*l.* portion then to raise 1900*l.*, and lay out 1500*l.* (part thereof) in the purchase of land for the benefit of Gilbert and wife, and to pay the residue to Gilbert; and subject to the term of ten years, to the use of his nephew Hugh Pomeroy for life, with remainder to his first and other sons in tail male, with remainder to John Gilbert (the defendant) for life, with remainder over. On the death of Roger Pomeroy in 1708, Hugh Pomeroy entered, but the portion of Mrs. Gilbert was unpaid. In 1712, the plaintiff's father advanced the 1500*l.* on a mortgage of the term of 120 years, in which Gilbert and wife (who had taken out administration to the surviving trustee of the term of 120 years,) and Hugh Pomeroy, the tenant for life, concurred. In 1758, Hugh Pomeroy died without issue male, and appointed Daniel Pomeroy his executor. On the death of Hugh Pomeroy John Gilbert entered. The plaintiff filed his bill of foreclosure. And it was argued that the words "as well by leasing, &c." were additional and not restrictive, for the testator could not have intended the portion should be raised out of the annual profits, which would have starved the remainder-man. The Lord Chancellor said, where a trust of a term for raising portions for daughters does direct a particular method for raising them, it implies a negative that they shall not be raised in any other way, and when the trust of the term, as in the present case, is to raise the portion by leasing for one, two, or three lives, or for any term of years determinable thereon, or for twenty-one years absolutely, it shall not be raised in any other way; and even by leasing, it could not be raised but by

making such leases, upon which the old rent was reserved. He afterwards observed, there was no time appointed for the raising of this portion, and therefore the portion was due when the profits could raise it, and it carried no interest; but when the 1500*l.* was or might have been raised by the profits, then it became due, and the land was discharged as having borne its burthen (*g*). And he declared that the profits received by Hugh Pomeroy were as if received by Ivy, because of the clause in the mortgage deed, that it should be lawful for Hugh Pomeroy to take the profits without account until default of payment, so that he was the tenant at will to the mortgagee; and therefore the mortgage was not pursuant to the trust, and so much of the profits as had been received must go towards the payment and sinking of the portion. But there having been a power of leasing, and the intention having been to charge the land as far as might be, he directed the master to see how far the land might have been charged by leasing, and whether any lives were vacant, and he reserved the consideration how far the estate should be chargeable thereby, and ordered the representative of Hugh Pomeroy to pay the mortgage monies and interest as far as the assets would extend. This decree was afterwards affirmed in the House of Lords (*h*).

In Evelyn *v.* Evelyn (*i*), the like doctrine as in

(*g*) *Et vide* Evelyn *v.* Evelyn, *infra*.
(*h*) 2 B. P. C. 468.
(*i*) Evelyn *v.* Evelyn, 2 P. Wms. 659.

Ivy *v.* Gilbert was recognized. In that case, a man having power by deed to make any lease or leases for years sans waste, for the raising of daughters' portions, *so that such lease or leases should cease and determine upon the raising of such portions, and costs and charges for raising the same;* appointed the lands to trustees for a term of years, to raise 8000*l.* as soon as conveniently might be after his decease; but without any provision for maintenance, or mention of any express time when the portions should be payable. He died leaving a widow who had a jointure on part of the premises, and three infant daughters, the eldest of whom was not eight years of age. It was considered that the clause "So that, &c." shewed an intention that the portions should be raised out of the annual profits, and the children being of tender years, the Court refused to raise the portion by sale or mortgage, but directed the 8000*l.* to be raised out of the rents and profits without interest, the profits to be accounted for from the father's death. From this decree there was an appeal, and the matter was compromised.

In Mills *v.* Bank (*k*), the words of the trusts were "by rents, issues and profits, or by making leases for one, two, or three lives, or for any number of years determinable on one, two, or three lives, reserving the ancient rent, or by granting copyholds on fines" to raise 10,000*l.* to be paid to daughters at eighteen or marriage, and to sons at twenty-one, or

(*k*) Mills *v.* Bank, 3 P. Wms. 1.

as soon after as the same could be raised out of the premises as aforesaid. It was urged that these affirmatives implied a negative, according to the general doctrine, that affirmative statutes imply a negative; in this the Lord Chancellor coincided, and said he approved the resolution in Butler *v.* Duncomb (*l*), that all trusts of terms directing the method of raising of money imply a negative, viz. that the money shall be raised by the method prescribed, and not otherwise. From the circumstances stated in this case, it appears there were two daughters who became entitled to the 10,000*l.*, one of whom married Sir George Rook, and the other married Mr. Ash, and that in the year 1706, Lord Chancellor Cowper had decreed the portion to be raised *by sale* of the trust term, and that 5000*l.*, being part of the trust estate of the infant son of Sir George Rook, had been advanced by the executor of Sir George Rook to Mr. Ash, on mortgage of the term, which was approved by a master, and the money was laid out in pursuance of a decree in another cause touching an account of the estate of Sir George Rook. But the case of Ivy *v.* Gilbert being afterwards decided by Lord Chancellor Macclesfield as before mentioned, this cause was re-heard before his lordship, who, after admitting he should not have made the decree, said, it was optional in the Court on a re-hearing to do any thing thereon; and that when the money had been lent under a decree, and with the approbation of a master, for the Court to make another decree setting aside this security, would be to make the

(*l*) *Supra.*

Court fight against itself and act inconsistently, which rendered it more proper to apply to a superior Court, and if the defendant would have the opinion of the Court for setting aside the securities, it seemed necessary for him to file an original bill; but he gave the defendant time to advise with his counsel what course he would pursue in so extraordinary a case. On the 11th of June, 1725, a petition was presented to have back the deposit, the parties having amicably ended the matter.

It may not be improper, in this place, to recal to our recollection the general rules on the vesting and payment of portions.

If a time certain is appointed for the payment of a portion, charged on land by deed or will, and the child dies before the time for payment arrives, the portion will sink for the benefit of the estate (*m*), unless a time for its vesting be expressly provided. To this rule, however, there are exceptions, when the payment of the portion is deferred from the circumstances, not of the person, but of the fund.

If no time certain is appointed for the payment of the portion, and the child dies before it is raised, it will nevertheless vest and be payable (*n*). But to this rule exceptions are to be found in cases in which the children have died at a very early age.

(*m*) Smith *v.* Smith, 2 Vern. 93.

(*n*) Earl Rivers *v.* Earl of Derby, *supra*.

As soon as all the events have happened, and the portion has become payable, it may be raised by sale or mortgage, unless the raising of it be contrary to the trusts of the settlement, as in some of the instances already mentioned, or unless the raising of it be restricted to annual profits, as before also mentioned.

Although all the events have happened, and the portions have become payable, yet if the trust be to raise the portion out of the rents and profits, and the children be of tender years, the Court will not direct a sale or mortgage, but will order the rents to be applied as they arise (*o*).

That the like course will, it seems, be pursued, if the legatee dies under twenty-one, and unmarried, before the portion is raised (*p*).

That, in case the portion is to be raised out of annual rents the portion will carry no interest; for the portion will not be due until the rents would have raised the portion; and as soon as it would have raised it, the land will have borne its burthen, and be discharged (*q*).

And lastly—That if the trust be expressly restricted to annual profits, the Court will in no case order a sale (*r*).

(*o*) Evelyn *v.* Evelyn, *supra.*
(*p*) Earl Rivers *v.* Earl of Derby, *supra.*
(*q*) Ivy *v.* Gilbert, *supra.*
(*r*) Small *v.* Wing, *supra.*

CHAPTER VII.

OF MORTGAGES BY EXECUTORS, BY TRUSTEES FOR SALE AND FOR PAYMENT OF DEBTS, AND UNDER POWERS OF CHARGING.

Both at law and in equity the whole personal estate of the testator vests in the executor, who, from the duties of his office and the nature of his trusts, must necessarily have an absolute power over it (*a*), whether specifically bequeathed (*b*), or limited in trust (*c*), or not. The executor's first duty is to provide for payment of debts; and if the general undisposed of property or the fund expressly provided by the testator, is not sufficient for such purpose, the property specifically bequeathed or given in trust must be resorted to. Nor can a testator, by any testamentary disposition of his personal estate, frustrate or delay the claims of his creditors (*d*). We accordingly find the adjudged cases and text books, when speaking of the powers vested in the executors, using strong expressions: and we also find the judges shewing great reluctance to fetter the executors in the exercise of their functions. Notwithstanding this

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(*a*) *Vide* Nugent *v.* Gifford, 1 Atk. 463; M'Leod *v.* Drummond, 17 Ves. jun. 161.

(*b*) Ewer *v.* Corbet, 2 P. Wms. 149; Burting *v.* Stonard, Ibid. 150; Langley *v.* Earl of Oxford, Amb. 17; Andrew *v.* Wrigley, 4 B. C. C. 125.

(*c*) *Vide* M'Leod *v.* Drummond, *supra.*

(*d*) Andrew *v.* Wrigley, *supra.*

great discretionary authority, numerous cases are to be found in the books, arising from the circumstances attending the disposition by executors of their testator's assets; and on some of the points a considerable difference of opinion has existed.

The power of the executors to dispose of a specific legacy seems to have been formerly questioned, and even in a modern valuable treatise (*e*) the point is put rather doubtfully. An early case (*f*) was considered as militating against this power; but it has been since observed (*g*), that was not in fact the case of a specific bequest, it being a charge on a particular part of the assets, and there was supposed to be strong circumstances of fraud in the conduct of the parties. Succeeding cases (*h*) have established this power of disposition by the executors beyond question (*i*)

(*e*) Sugden on Vendors and Purchasers, 550, 8th edition.

(*f*) Humble *v.* Bill, 2 Vern. 444.

(*g*) 17 Ves. jun. 160; 3 Atk. 241.

(*h*) Ewer *v.* Corbet; Burting *v.* Stonard; Langley *v.* Earl of Oxford, *supra.*

(*i*) Sir Edward Sugden, in his Treatise on Vendors and Purchasers, has raised a doubt whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cites Thomlinson *v.* Smith, Finch, 378. It is submitted this was a case of gross fraud, and is but a slender authority. In that case, a man bequeathed a leasehold estate to his wife for life, remainder to A. for ten years, remainder to his children. The widow took out administration with the will annexed, and assented to the bequest, and enjoyed the property during her life. After her death, the defendant in the suit, (who had

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. Accordingly the proposition is broadly laid down by Lord Hard-

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become the owner of the inheritance) purchased of A. his interest in the leasehold. After the expiration of the ten years, the children exhibited a bill for an account, and prayed the remainder of the term might be decreed to them. The defendant set up an assignment by the widow as administratrix, in consideration of 150*l.*, the better to enable her to pay the debts of the testator, and insisted, that, as the plaintiffs charged that the administratrix assented to the bequest, they had their remedy at law notwithstanding the assignment, and ought not to have relief in equity. But the Court being satisfied that the testator left assets to pay his debts, and that the administratrix did assent to the said legacies, decreed to the plaintiffs the residue of the term. It is submitted that in this case the enjoyment of the leasehold by the administratrix for life, and the subsequent purchase of A.'s interest, were in direct contradiction to the alleged assignment by the administratrix; and it is conceived that if a purchaser or mortgagee shall *bonâ fide* deal with an executor, within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted, at law or in equity, to set up the executor's assent against the sale or mortgage, for, by sale and delivery, the title of the purchaser or mortgagee is complete. *Vide* Scott *v.* Tyler, Dickens, 725, and 17 Ves. jun. 166. In a bill before parliament it is proposed to enact, that the assent of an executor or administrator shall not vest in any legatee the legal title to any personal estate other than such chattels as may pass by delivery; but that such title shall remain vested in the executor or administrator until he shall have executed an assignment or release in writing of such personal estate.

wicke in Mead *v.* Lord Orrery (*k*), and yet more broadly and expressly by Lord Thurlow in Scott *v.* Tyler (*l*), and has been since recognized by Lord Eldon in M'Leod *v.* Drummond (*m*). Lord Loughborough, indeed, is reported to have said, a mortgage is not a natural way of raising money, and that it may lead to an inquiry as to the circumstances of the testator's estate (*n*); but this observation, it is conceived, must be considered as applying to transactions attended with circumstances exciting suspicion of fraud.

The mortgage may be either of legal or equitable assets (*o*), or of mere *choses in action* (*p*), and may be by actual assignment, or by deposit (*q*); and a dealing with one of many executors will be valid, for each is competent (*r*). The deed of mortgage need not state that the money is wanted for the purposes of the will, for in order to vitiate the security, it must be shewn the money was *not* for the payment of debts (*s*). Nor is the mortgagee bound to see to its application (*t*), although Lord Kenyon has expressed an opinion that a trust might be so framed as to call on a purchaser from an executor to see to the

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(*k*) Mead *v.* Lord Orrery, 3 Atk. 239.

(*l*) Scott *v.* Tyler, Dickens, 724.

(*m*) M'Leod *v.* Drummond, 17 Ves. jun. 154.

(*n*) Andrew *v.* Wrigley, 4 B. C. C. 138.

(*o*) Nugent *v.* Gifford, 1 Atk. 463; *et vide* 17 Ves. jun. 167.

(*p*) Scott *v.* Tyler, *supra*.

(*q*) Ibid. (*r*) Ibid.

(*s*) Bonney *v.* Ridgard, 4 B. C. C. 138, cited.

(*t*) Scott *v.* Tyler, *supra*; *et vide* Elliot *v.* Merryman, Barnard. 78.

application of the money (*u*); but this observation must also, it is conceived, be supposed to apply to a sale made under very peculiar circumstances, and not for the purpose of the payment of debts generally.

Fraud or covin, however, will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or *in any other manner* contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*x*).

It was indeed held by Lord Mansfield (*y*), that such was the power of an executor, that although it was apparent on the face of the transaction that he was about to apply the assets to a purpose foreign to the will, yet a person with that knowledge was justified in dealing with him upon the supposition that all the debts were paid, or that the testator's estate was or might be indebted to the executor to that amount: and in a recent case (*z*), under peculiar circumstances, the latter supposition was allowed to be urged on behalf of depositaries of bonds, to whom they had been pledged by executors for securing advances to themselves in another capa-

(*u*) Bonney *v.* Ridgard, 4 B. C. C. 130, cited.
(*x*) Scott *v.* Tyler, *supra*.
(*y*) Whale *v.* Booth, 4 Term Rep. 625, note.
(*z*) M'Leod *v.* Drummond, *supra*.

city. Lord Mansfield accordingly held, that where a creditor under a writ of *fi. fa.* took in execution *bona propria* and *bona testatoris* vested in his debtor, *knowing them to be such*, the execution was valid on the ground that the executors joined in the bill of sale, which his lordship considered tantamount to a conveyance (*a*). This doctrine, to the full extent laid down by Lord Mansfield, Lord Chancellor Eldon expressed himself not prepared to follow (*b*). And in a case subsequent to Whale *v.* Booth, Lord Kenyon, and Ashhurst and Grose, Justices, against Buller, Justice, decided that *bona testatoris* could not be taken in execution under a *fi. fa.* in satisfaction of the executor's private debt (*c*).

In two leading cases also in Equity (*d*), Lord Hardwicke supported assignments of the testator's assets, made by the executor in satisfaction of his own debt or for his private purposes. But it is to be observed, that in both these cases a considerable time had elapsed since the death of the testator, and in the first instance the executor was also sole residuary legatee, (the bill being filed by the testator's daughters as *creditors* under a marriage settlement); and in the second instance, three executors concurred in the assignment of a mortgage as a collateral security for one of them in an appointment of receiver, who

(*a*) Whale *v.* Booth, *supra.*

(*b*) M'Leod *v.* Drummond, *supra.*

(*c*) Farr *v.* Newman, 4 Term Rep. 621; *et vide* what is said of this case by Lord Eldon in M'Leod *v.* Drummond, *supra.*

(*d*) Nugent *v.* Gifford, *supra*; Mead *v.* Lord Orrery, *supra.*

was also one of five residuary legatees, and to whom the deed stated the mortgage to belong. In this latter instance, the bill was filed by the other residuary legatees, being the first instance, it seems, in which *residuary* legatees had attempted to follow the assets into the hands of a purchaser, the former instances having been confined to creditors and specific legatees. These two cases depended on particular circumstances (*e*); the broad principles contained in Mead *v.* Lord Orrery were afterwards disapproved by Lord Kenyon in Bonney *v.* Ridgard (*f*); and in a prior case (*g*) relief had been actually granted to a creditor against a purchaser of part of the testator's assets from an executor, the purchaser having allowed the executor's private debt out of the purchase-money, and having express notice that the creditor's debt was unpaid, than which, Lord Alvanley remarks, there cannot be a stronger instance of devastavit (*h*). In a modern case (*i*) relief was granted to a *pecuniary* legatee against bankers, with whom part of the assets had been deposited, to secure a private debt of the executor, within a month after the death of his testatrix, attended with circumstances of gross negligence in the bankers, but unaccompanied by fraud; which decision is in accordance with the known opinion of Lord Chancellor Thurlow on the second

(*e*) *Vide* Tanet *v.* Ivie, 2 Ves. 470.

(*f*) Bonney *v.* Ridgard, 2 B. C. C. 433; 4 B. C. C. 130; 7 Ves. jun. 167, cited.

(*g*) Crane *v.* Drake, 2 Vern. 616.

(*h*) Andrew *v.* Wrigley, 4 B. C. C. 137.

(*i*) Hill *v.* Simpson, 7 Ves. jun. 152.

point in the case of Scott *v.* Tyler (*k*); in which latter case, however, the circumstances were stronger than in Hill *v.* Simpson, for in Scott *v.* Tyler the bonds were specifically bequeathed, and were handed over to the bankers to secure a debt *already due* from the executor, and not for advances *then made*, which, according to the opinion of the Master of the Rolls in M'Leod *v.* Drummond (*l*), is a material circumstance; and the bankers had also previous knowledge of the property.

In the case of M'Leod *v.* Drummond (*m*) relief was refused on a bill filed by two co-executors in Scotland, who had never acted, but had permitted the other two executors in England to manage the property for a great length of time. The acting executors, many years after the testator's death, pledged some bonds belonging to him with their bankers, to secure advances made to them as army agents, representing that an account was kept between *them and the estate*, to which they were, or frequently might be, in advance. The Master of the Rolls dismissed the bill, and on appeal to the Lord Chancellor, the decree was affirmed under the peculiar circumstances of the case.

Relief will also be refused if there has been great delay on the part of the legatees in making claim, even although they have but a contingent or expectant right, for such an interest will entitle them to know

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(*k*) *Supra.* (*l*) 14 Ves. jun. 353.

(*m*) M'Leod *v.* Drummond, 14 Ves. jun. 353; *et vide* 17 Ves. jun. 170.

what debts the testator owed, and what part of his estate has been applied to the payment of them (*n*).

The result of the cases seems to be, that if a purchaser or mortgagee advance money to an executor, (even though the executor be also residuary legatee,) for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk, and is liable to a suit for relief on bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if such legatee pursue his remedy within a reasonable time. If the executor is also specific legatee, a mortgage from him of the specific legacy in satisfaction of his private debt will be safe, unless it can be shewn the creditor knew there were debts unpaid (*o*).

It is material also to observe, that if a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted.

Estates are sometimes vested in trustees upon trust for *sale* without any express power to mortgage. A mortgage is a partial sale, and therefore a trust for sale will, generally speaking, include a mortgage (*p*)*;

(*n*) Andrew *v.* Wrigley, 4 B. C. C. 136.

(*o*) Taylor *v.* Hawkins, 8 Ves. jun. 209.

(*p*) 3 P. Will. 9.

* In corroboration of this doctrine, it has been suggested, that if a trustee for sale becomes also the purchaser, relief in equity is given to the *cestuis-que* trust on their paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale.

and it must depend upon the nature of the trust, if it be not authorized by it. If the object of the trust is for a definite purpose, such as to raise a certain sum of money for debts, portions, or the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case, where practicable, raised by mortgage. Questions of this sort must depend on the peculiar circumstances of the trust, and the intention of the parties as shewn on the instrument.

If there be a trust to raise money by sale or mortgage, and the trustees raise the money by mortgage, it is doubtful whether they can afterwards exercise their trusts for sale for the purpose of discharging the mortgage; for the money being once raised, the trustees are *functi officio*, the purposes of their trust being completed. It is clear the mortgagee cannot *compel* them to sell, even if they have the power (*q*).

If a man has a power of charging an estate with a sum of money, he may also charge it with interest (*r*); nor will equity interfere to diminish or reduce the rate of interest charged (*s*). An unlimited power to charge will in equity authorize a disposition of the estate itself in trust for sale (*t*); but a particular

(*q*) Palk *v.* Lord Clinton, 12 Ves. jun. 48.

(*r*) Killmurry *v.* Geery, 2 Salk. 538; Boycot *v.* Cotton, 1 Atk. 556; Evelyn *v.* Evelyn, 2 P. Wms. 591; Hall *v.* Carter, 3 Atk. 359; Lewis *v.* Freke, 2 Ves. jun. 507.

(*s*) Lewis *v.* Freke, *supra*.

(*t*) Long *v.* Long, 5 Ves. jun. 445.

power of charging will not authorize a limitation of the fee to secure the money, and the appointment will be void (*u*). Equity would, however, most probably, in the latter case, relieve, as in the case of a defective execution (*x*).

The converse of the doctrine laid down in Long *v.* Long is good; for a power to appoint the fee will authorize a charge, which equity will carry into effect by a sale (*y*). And it will also authorize an appointment to trustees in trust for sale (*z*).

In a modern case a power to charge with a sum of money was held to authorize the grant of a rent charge until the principal and interest were paid (*a*).

If there be a devise in trust, by mortgage or sale, to raise money for payment of debts, the trustees may proceed to raise the money without the sanction of a decree of a Court of Equity; for decrees of equity do not give rights, but are only an execution of the trust or power already subsisting (*b*). A devise for payment of debts takes the case out of the statutes

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(*u*) Jenkins *v.* Keymis, 1 Lev. 150, 237; Hard. 395; 1 Ch. Ca. 103.

(*x*) See Sugden on Powers, 5th edit. 455.

(*y*) Roberts *v.* Dixall, 2 Eq. Ca. Ab. 668; *et vide* Palmer *v.* Wheeler, 2 Ball & Beatty, 18.

(*z*) Kenworthy *v.* Bate, 6 Ves. jun. 793; and see 1 Ves. & Bea. 78.

(*a*) Blake *v.* Marnell, 2 Ball & Beatty, 35.

(*b*) Earl of Bath *v.* Earl of Bradford, 2 Ves. 587.

against fraudulent devises (*c*); so that the bond and simple contract creditors can only come in *under the will* (*d*), and they are therefore put on an equal footing in equity, and are to be paid *pari passu* (*e*); for the specialty creditors cannot pursue the estate as legal assets, which, if it were within the statutes, they might do (*f*). On the same principle it has been held, that the creditors must comply with the terms of the will; and, therefore, if the debts are directed to be paid out of the annual rents, there can be no sale or mortgage (*g*). In Cook *v.* Parsons (*h*) Lord Nottingham thought the words "To set and farm let, and out of the rents (without saying profits) pay his debts," were not sufficient whereon to ground a sale; and Lord Hardwicke refused a sale where the words were, "by perception of rents and profits, or by leasing or mortgaging the same to raise and pay the sums and legacies mentioned in the will" (*i*); he added, if it had been a trust of the rents and profits, it might have been sold. But his lordship did not recollect any case which would authorize a sale where there were other limiting words following

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(*c*) 3 William & Mary, c. 14; 6 & 7 Will. III. c. 14; 4 Ann, c. 5 (Ireland); 47 Geo. III. c. 74, repealed by 1 Will. IV. c. 47; *et vide supra*, chap. FRAUDULENT DEVISES.

(*d*) Howse *v.* Chapman, 4 Ves. jun. 550.

(*e*) Conyngham *v.* Conyngham, 1 Ves. 523.

(*f*) Fonb. Treat. on Equ. vol. i. 448, note (*o*).

(*g*) Lingard *v.* Earl of Derby, 1 B. C. C. 311.

(*h*) Cook *v.* Parsons, Pre. Chan. 184; *et vide* Sir John Talbot *v.* Duke of Shrewsbury, Gilb. Rep. Eq. 89.

(*i*) Ridout *v.* Earl of Plymouth, 2 Atk. 105.

rents and profits. In Baines *v.* Dixon (*k*), estates were devised to trustees and their heirs upon trust for payment of the testator's funeral expenses, debts, and legacies, as far as his personal estate should be deficient, and for raising maintenance, &c. for his children; and to convey to his eldest son, at twenty-three; and he directed the legacies to be paid after his debts were satisfied, as the rents should *advance* the same. Lord Hardwicke, on appeal, directed the debts to be raised by sale, and the legacies to be paid out of the annual profits.

But in order to take a devise of real estate for payment of debts out of the statutes against fraudulent devises, it seems necessary it should *effectually* provide for the purpose (*l*).

A general charge of debts by deed or will on real estate, will not give interest on simple contract debts not carrying interest (*m*); nor will the single circumstance of the debt being liquidated in the Master's Office give interest; nor will any delay entitle the

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(*k*) Baines *v.* Dixon, 1 Ves. 41.

(*l*) Hughes *v.* Doulben, 2 B. C. C. 614; *et vide* Fonb. Treat on Equ. vol. i. 448, note (*o*). Bailey *v.* Ekins, 7 Ves. jun. 323; *et vide supra*, p. 115.

(*m*) Barwell *v.* Parker, 2 Ves. 364; Earl of Bath *v.* Earl of Bradford, ib. 588; Shirley *v.* Ferrers, 1 B. C. C. 41; Creuze *v.* Hunter, 2 Ves. jun. 157; *vide contra* Carr *v.* Lady Burlington, 1 P. Wms. 329; Maxwell *v.* Wettenhall, 2 P. Wms. 26. But the devise will carry interest, if the charge be of the simple contract debts of a third person, Shirt *v.* Westby, 16 Ves. jun. 393.

simple contract creditor to interest, if the delay arise out of or is the natural consequence of the jurisdiction of the Court, or might have been prevented by the party (*o*). On a cause coming on for further directions, the Court may give interest (*p*). After liquidation, any one creditor may prosecute the decree (*q*). "And the trust or charge, whether for simple contract or specialty debts (for as to the trust both are on a footing, though there be no term created for that purpose), gives to a Court of Equity, incidentally, authority to make a mortgage or sale, because the estate, by virtue of such devise, becomes a trust, and such Court having jurisdiction to liquidate it, after liquidation can give interest on the debt.

"Then the debt, being a gross sum with the interest, becomes an incumbrance, and a mortgage may be made to pay it off; and in such case, the creditors, if not paid, can have no relief but by application to a Court of Equity, because they can have no action against the heir (for want of assets descended), or against him and the devisee (because the case is out of the statute), and then when all or any of the creditors join in, or bring a bill for satisfaction of their debts, and to have a performance of the trust by sale or mortgage, from the moment the mortgage is made, that also, it is clear, carries interest.

(*o*) Creuze *v.* Hunter, *supra*, and see note at the end of the case.
(*p*) Ibid. (*q*) Ibid.

"And as the Court of Chancery will, upon bills brought by creditors, decree money to be raised by mortgage or sale, so they will support trustees who mortgage without such decree first had, *if it be fairly done*, for the trustees need not wait for a decree of the Court, which, if it were necessary, would oblige every person to come there, but they may do it without, and this is plain, if we consider the nature of a decree of that Court, for such decree does not (as already stated)(*r*) create or give a right, but only enforces an execution of a trust and power before subsisting.

"And in allowing interest in such cases, Equity acts by analogy to the proceedings, where creditors are left to their legal remedy, for if a bond creditor bring an action against the heir at law, or against him and the devisee jointly, and (since the statute of fraudulent devises) if the heir, in case of descent, or heir and devisee joining in case of a devise, come in and confess real assets, (which in justice they ought to do,) in that case judgment goes against them for the debt to be levied out of the estate; but because it cannot be known how much the value of the land descended or devised is, *per annum*, there issues a writ of inquiry to the sheriff, and the judgment proceeds, that the sheriff shall deliver the lands to the plaintiff, *donec debitum prædictum levaverit;* then the sheriff makes an inquiry in nature of an extent, fixes the extended value, which is always

(*r*) *Supra*, page 209.

much below the real value of the lands, and delivers them to the plaintiff according to that value. The remedy that the heir and devisee have, is by *scire facias* to have an account and the lands delivered back. But a Court of law will do that only according to the extended value by the sheriff; therefore the heir and devisee must come to a Court of Equity to have it extended according to the real value, and to have it back afterwards. But the Court will insert terms, namely, upon paying interest, for a Court of Equity will not extend its powers to assist the heir at law or devisee, but according to equity, by making him answer satisfaction, and do justice (*s*)."

Lord Eldon remarked, that a mere charge is a declaration of intention, on which a Court of Equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts (*t*).

It is decided that executors or trustees shall not, after a decree to account, lend money on mortgage, without an application to the Court (*u*); and it has been said, *arguendo*, that a trust to lay out money "on good security," will not authorize a loan on mortgage (*x*). If the mortgage is contrary to the

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(*s*) *Vide* Earl of Bath *v.* Earl of Bradford, 2 Ves. 589; and Powell on Mortgages, vol. i. 88, 4th edit.

(*t*) Bailey *v.* Ekins, 7 Ves. jun. 323.

(*u*) Widdowson *v.* Duck, 2 Mer. 494.

(*x*) Ibid. *Sed quære.*

trust, or in disobedience of an order to the contrary, the executors or trustees will be responsible for the loss; but otherwise the mortgage will be a fund in their hands, which they will be ordered to pay into Court (*y*).

If a mortgagor pay off a mortgage, having notice it is trust money, he is bound in equity to see to its application, unless he is expressly or impliedly exempted from that obligation; and even if he is so exempted, still a difficulty occurs, from the necessity of producing the settlement or will creating the trust, to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the *mortgagor* notice of the fact of the money being in trust.

There is a further rule in equity, *viz.* that if two or more persons advance their own monies on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint-tenancy at law, nevertheless in equity they shall be considered as tenants in common, and there shall be no survivorship between them. The consequence is,

(*y*) Widdowson *v.* Duck, 2 Mer. 494.

that if a mortgage is made to two or more persons, without notice of the trust on the face of the deed, so that they appear to have made advances of their proper monies; and if one of them die before the mortgage-money is paid off, the concurrence of the executor or administrator of the deceased mortgagee becomes necessary in the discharge. This inconvenience has given rise to a proviso now frequently inserted in such instruments, *viz.* that if one of the mortgagees shall die before the money is paid off, the receipt of the surviving mortgagee or his executors, administrators or assigns, shall be a good and sufficient discharge to the mortgagor, his heirs, executors, administrators and assigns, although and notwithstanding the executor or administrator of the deceased mortgagee shall not concur therein, any rule of equity to the contrary thereof in any wise notwithstanding.

CHAPTER VIII.

OF EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

THE statute of the 29 Car. II. cap. 3, commonly called the statute of frauds and perjuries, enacts (*a*), that no "action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Notwithstanding this statute, it is now decided, that if the title deeds of an estate are (without even verbal communication) deposited by a debtor in the hands of his creditor, or of some third person on his behalf, such deposit is *of itself evidence of an agreement executed for a mortgage of the estate* (*b*), of which agreement the creditor may avail himself as of an *agreement in writing* for that purpose, for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be allowed to plead the statute of frauds; or if the debtor become bankrupt, the creditor may present the usual petition for payment of his debt by sale of the estate, and to be allowed to prove the deficiency, if any under the commission.

(*a*) 29 Car. II. c. 3, s. 4.

(*b*) *Ex parte* Wright, 19 Ves. jun. 258.

An equitable mortgage by deposit of title deeds will be recognized even in a Court of Law, as in a case (*c*) where an action of assumpsit was brought by the assignees of a bankrupt (who was the legal owner of a moiety of an estate in a register county) to recover from the party entitled to the other half of the estate, but who had received the whole of the rents, a moiety of such rents. On the trial it appeared that the defendant had lent the bankrupt a sum of money to complete his part of the purchase, and it was agreed between them, that the title deeds should be deposited as a security. The defendant subsequently took an assignment of the moiety of the bankrupt in the estate, but the assignment was not registered. The assignment from the commissioners to the assignees was duly registered, and therefore had preference to the unregistered deed (*d*). The assignees claimed to be entitled to recover, *at law*, one moiety of the rents received by the equitable mortgagee, but on the trial of the cause were nonsuited. And on argument in the King's Bench, the Court held the verdict to be right, on the ground that the equitable mortgagee might have retained the rents against the bankrupt if he had been solvent, and they might therefore be retained against his assignees; and the Court held the registry not to apply to an equitable mortgage where there was no deed to be registered.

But, however, in a case of trover (*e*) for the reco-

(*c*) Sumpter and others *v.* Cooper, 2 Barn. & Adol. 223.

(*d*) See Doe *v.* Alsop, 5 Barn. & A. 142.

(*e*) Harrington *v.* Price, 3 Barn. & Adol. 170.

very of the title deeds by the owner of the estate, the claim of a depositee of the title deeds was not admitted. In that case a party had sold the estate, but refused to deliver up the deeds, on a pretence which was groundless. The purchaser sold to a third party, who brought action of trover for the deeds, and in 1824 obtained judgment. In September 1825, the original vendor deposited the deeds with the defendants, and absconded. In 1827, the judgment was docketed against the vendor. The purchaser then discovering the deeds to be in the possession of the defendants, brought trover against them, and relied on the case of Hooper *v.* Ramsbottom (*f*), which decided that the right to the estate carries with it the right to the title deeds, notwithstanding their being pawned by the vendor subsequently to the execution of his deed of conveyance to a party without notice. On the part of the defendants, the neglect of the purchaser was urged in not securing the title deeds, and the case of Head *v.* Egerton (*g*) was cited, in which it was decided that a second mortgagee obtaining possession of the title deeds, without notice of the prior mortgage, could not be compelled to give them up to the first mortgagee without payment of his debt. But the Court held there was a difference between the case of a purchaser and a mortgagee, as in the latter case the mortgagor generally retains possession of the estate, and therefore his retaining the title deeds is a circumstance more likely to mislead, and the postea was entered for the plaintiff.

(*f*) 6 Taunton, 12.
(*g*) 3 P. Wms. 280.

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of the title deeds of an estate gave the holder no interest in the estate itself, except collaterally, as in the instance put by Lord Eldon (*h*), that is, if the owner of the lands could not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder, so that the possession of the deeds gave no direct interest in the estate, but gave to the creditor an interest arising out of the power of embarrassing the property in the sale (*i*). And it was considered, that to give the creditor a charge on the land without an agreement in writing, would be in direct contravention to the statute of frauds. Lord Eldon, indeed, is reported to have used expressions denoting his opinion, that the judicial decisions establishing this doctrine approach to a virtual repeal of the statute, for he is reported to have said, when pressed to a further extension of the doctrine, that the statute must not be *repealed* by him farther than it had been hitherto *repealed* by his predecessors, to whose authority he submitted (*k*); language which must be construed as denoting his lordship's strong disapprobation of that which he admitted must be considered as settled law (*l*). How far its existence in deterioration of the public revenue, by di-

(*h*) *Ex parte* Whitbread, 19 Ves. jun. 211; *et vide ex parte* Kensington, 2 Ves. & Bea. 83.

(*i*) Vide Head v. Egerton, 3 P. Wms. 279.

(*k*) *Ex parte* Whitbread, *supra*.

(*l*) *Ex parte* Kensington, *supra*.

minishing the amount of stamp duties, is of sufficient importance to attract the notice of the legislature, remains to be seen. Lord Eldon repeatedly expressed his surprise that the doctrine was ever admitted, and a determination has been shewn not to extend it beyond its present limits (*m*).

The first decision in favour of this doctrine was made by Lord Chancellor Thurlow in the case of Russell *v.* Russell, first heard before Lords Commissioners Loughborough and Ashhurst in Easter Term, 1783 (*n*). In that case a bill was filed by a depositary of a lease for securing a debt owing by one who had since become bankrupt, and praying a sale. It was objected by the defendants that the plaintiff's claim was against the statute of frauds and perjuries. The Lords Commissioners considered that this was a contract executed, and that it was open to explanation upon what terms the lease was delivered; an issue was accordingly directed at law to try whether the lease was deposited as a security for the sum advanced; which, upon trial, the jury found. On a further hearing (on the equity reserved) Lord Chancellor Thurlow ordered the lease to be sold, and the plaintiff to be paid his money. This case was followed by those of Featherstone *v.* Fenwick, and Harford *v.* Carpenter, both heard before Lord Thurlow, in which the same principle was acted upon (*o*).

(*m*) *Ex parte* Hooper, 1 Mer. 7.

(*n*) Russell *v.* Russell, 1 Bro. C. C. 269.

(*o*) Featherstone *v.* Fenwick, Harford *v.* Carpenter, 1 Bro. C. C. 269, note.

These decisions are the foundation of the doctrine of equitable mortgage by deposit of title deeds, a species of security which, however much it has excited the disapprobation of succeeding judges (*p*), has now become of daily practice.

If the general registry which was lately under consideration had been established, this mode of security must have been annihilated.

It was the opinion of the late Sir William Grant, that the deposit must be made with the view and intent of an immediate security, and not *diverso intuitu;* and in a case heard before him in December, 1806, he expressly decided accordingly (*q*). The facts were: Messrs. Wilkinsons (father and son) were indebted to Norris in a considerable sum, partly on his own account, and partly as factor for a foreign house. Wilkinson the father, being possessed of landed estate, his son by his direction delivered the title-deeds into the hands of Thompson (the solicitor of Norris). After this Wilkinson the father died, having by his will devised his real estate to trustees upon trust to sell and pay debts. Norris afterwards filed his bill, alleging the delivery of the title deeds to Thompson to have been by way of deposit for security of the debt. A considerable difference of testimony existed be-

(*p*) *Ex parte* Haigh, 11 Ves. jun. 403; Norris *v.* Wilkinson, 12 Ves. jun. 192; *Ex parte* Whitbread, *supra; Ex parte* Hooper, *supra.*

(*q*) Norris *v.* Wilkinson, 12 Ves. jun. 192.

tween Thompson and Wilkinson, jun. relative to the transaction; but the facts admitted by Thompson were, that the deeds were delivered to him for the purpose of enabling him *to prepare* a mortgage security, and which was accordingly prepared; but that the execution of it was prevented by the illness and subsequent death of Wilkinson, sen. Wilkinson, jun. distinctly swore in his answer, that the deeds were delivered as *instructions* for preparing a security, and not as a security in the first instance, and Thompson could not recollect Wilkinson, jun. saying in terms, that he and his father did agree to the deposit of the deeds *as a security*. By the bill the plaintiff insisted he had a specific lien on the land: the defendant contended, he must come in as a creditor under the decree for payment of debts. The Master of the Rolls, after expressing his want of approbation of the doctrine established by the cases of Russell and Russell, Featherstone and Fenwick, and Harford and Carpenter, said, "I am of opinion this is not a case of deposit of deeds. It is clear, these deeds were not delivered by way of deposit in the sense in which that word has been used in the cases, *i. e.* as a present and immediate security, but were delivered only for the purpose of enabling the attorney to draw the mortgage, which it is alleged Wilkinson, sen. had agreed to give. Passing by all the objections made to Thompson's testimony, and all consideration of the particulars in which it is contradicted by the deposition of Wilkinson, jun. and taking it exactly as it stands, it does in every part of it prove what I have stated in respect to the purpose for which the deeds were put into his hands.

Now in all the cases that have been referred to, the deeds were delivered *by way of deposit.* Such deposit was indeed held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute *an immediate pledge,* with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which the parties had in contemplation." And in support of his decision he cited a case heard before Lord Hardwicke (*r*), in which a man having delivered his title deeds to an attorney for the purpose of a mortgage being prepared, died before it was completed, and the creditor attempted to establish a claim on the land as equitable mortgagee, but the point was given up. In a case before Lord Eldon (*s*), the Chancellor decided that where leaseholds had been assigned by way of mortgage for securing 400*l.*, the mortgagee could not tack a simple contract debt on a parol agreement, because the contract, under which he held, was a contract for conveyance only, and not for deposit.

The doctrine in these cases appears, however, to be contrary to a case which was not reported at the time when Norris *v.* Wilkinson was decided (*t*), and to be also in opposition to a decision in bankruptcy

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(*r*) Brizick *v.* Manners, 9 Mod. 284.
(*s*) *Ex parte* Hooper, 1 Mer. 7.
(*t*) Edge *v.* Worthington, 1 Cox, 231.

made by Lord Eldon himself(*u*). And in a yet more recent case it was decided by Lord Gifford, Master of the Rolls, that an agreement to give a mortgage and the delivery of the title deeds for the purpose of having the agreement carried into effect, constituted an equitable mortgage(*x*).

The deposit will create an equitable mortgage for the debt then due, although there be not one word spoken at the time (*y*). But if the deposit is made for the purpose of gaining credit, it will not cover monies previously advanced and then due (*z*).

The deposit may be a security as well for debts actually due, as also for future advances, if made out by evidence or oath uncontradicted. Of this, a doubt seems to have been entertained by the Master of the Rolls in Norris *v.* Wilkinson: but in a subsequent case heard before Lord Chancellor Eldon (*a*), where Knight deposited title deeds with Langston and Co. as a security for their advances on the account of Joshua and Edward Knight; and Langston and Co. advanced several sums between the 14th of June, when the deeds were deposited, and the 20th of June, on which day a memorandum was signed by Knight, stating that the deeds were deposited as a security for the several advances; on the same day

(*u*) *Ex parte* Bruce, 1 Rose, 374.

(*x*) Hockley *v.* Bantock, 1 Russel, 141.

(*y*) *Ex parte* Mountfort, 14 Ves. jun. 606; *Ex parte* Langston, 17 Ves. jun. 230; *Ex parte* Kensington, 2 Ves. & Bea. 83.

(*z*) Mountfort *v.* Scott, 1 Turner & Russell, 274.

(*a*) *Ex parte* Langston, *supra*; and see *Ex parte* Mountfort, *supra*.

an act of bankruptcy was committed by Knight, on which a commission issued on the 23d. The Lord Chancellor decided that the memorandum, containing nothing inconsistent with the claim of Langston and Co., could not prejudice them, but was a ratification of the prior agreement, and that the petitioners were entitled to hold the deeds as a security for their debt (*b*).

The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control. But it will not be effectual if made to the wife of the depositor, nor *à fortiori* if permitted to be retained by the debtor, even if he should deliver a memorandum to that effect into the hands of the creditor (*c*). Nor will the equitable deposit in the hands of one person be extended to an advance made by another person, unless the party holding the deeds is a mere trustee and has made no advance (*d*).

Although there be an unstamped agreement between the parties, which is inadmissible as evidence, yet other parol evidence may be adduced to establish the equitable mortgage (*e*).

(*b*) *Vide Ex parte* Hooper, *supra*, where Lord Chancellor Eldon said he was dissatisfied with the principle on which he acted in the above case, of extending the original doctrine so as to make the deposit a security for future advances, and that at all events the doctrine was not to be further enlarged.

(*c*) *Ex parte* Coming, 9 Ves. jun. 115.

(*d*) *Ex parte* Whitbread, 19 Ves. jun. 212.

(*e*) Hien v. Mill, 13 Ves. jun. 114.

An equitable mortgage by deposit of title deeds will have preference over a subsequent purchaser or mortgagee of the legal estate *with notice*. And notice will be implied from the nature of the transaction, as if the subsequent purchaser or mortgagee was informed the creditor was in possession of the title deeds, and neglected to make inquiry for what purpose he held them, which is *crassa negligentia* (*f*).

If a *bonâ fide* deposit be made, and the debtor afterwards and in immediate contemplation of bankruptcy, execute a conveyance of the legal estate to the creditor in completion of the mortgage, it is a good legal title and will be protected by the equitable title previously obtained (*g*).

When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement without an actual re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended to secure advances made by the bank after a change of partners (*h*).

In order to constitute the equitable mortgage by deposit, there must, it seems, be a delivery of *all the title deeds* (*i*). In *Ex parte* Wetherell, the question

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(*f*) Hiern *v.* Mill, 13 Ves. jun. 114.
(*g*) *Per* Lord Eldon in Hiern *v.* Mill, *supra.*
(*h*) *Ex parte* Kensington, 2 Ves. & Bea. 79.
(*i*) *Ex parte* Pearse, 1 Buck. 525.

was, what was the effect of the delivery of the title deeds to one moiety only of the estate, the title deeds of the other moiety being retained by the debtor, and passing into the possession of his assignees, the mortgagees having understood that the deeds delivered to them related to the entirety. The Lord Chancellor thought that under the circumstances of that case, there was sufficient *evidence in writing* (and on which he grounded his decision) that there should be a mortgage of the entirety, and consequently he did not determine, to use his own words, "Whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security."

An equitable lien on copyholds will be created by a deposit of a copy of court roll (*k*)

It should seem that if there be a written instrument stating the terms on which a deposit is made, an inference contrary to it, founded on affidavit alone, will not be admitted. Such at least appears to be the principle on which the case of *Ex parte* Combe was decided (*l*). The case is not very accurately reported, but it should seem the facts were as follow:—Meux and Co. were creditors of Morgan, who for their security had executed a warrant of attorney to confess judgment, and had deposited the

(*k*) *Ex parte* Warner, 19 Ves. 202; 1 Rose, 286.

(*l*) *Ex parte* Combe, 17 Ves. 369; *et vide Ex parte* Kensington, *supra*.

lease of his house with them. In January, 1810, Meux and Co. entered up judgment and levied execution for 1560*l.* 6*s.* 5*d.* Morgan applied to Combe and Co. to lend him money to satisfy Meux and Co. and to supply him with beer, which they agreed to do; and Morgan on the 20th of Jan. 1810, executed to them a warrant of attorney, with a defeazance stating that Combe and Co. had that day lent him 1250*l.* and *that he had deposited* with them the lease of the house as a collateral security for the 1250*l.* and further advances not exceeding 1500*l.* On the same day Combe and Co. paid off Meux's debt, and satisfied the law charges and sheriffs' poundage, amounting in the whole to 1252*l.* and thereupon Meux and Co. delivered to them the lease. On the 14th of August following, Combe and Co. entered up judgment against Morgan, and levied execution for 1420*l.* 14*s.* But a commission of bankrupt issuing against him on that day, they withdrew their execution, and proved part of their debt for beer delivered as a debt under the commission, and presented a petition praying a sale of the leasehold premises for payment of the residue of their debt; and they contended that having paid off Meux and Co. they were entitled to stand in their place. An important fact is omitted in the report, viz. the time when the act of bankruptcy took place; but it must be presumed to have occurred previously to the 20th of January, 1810, for otherwise there seems no good reason why Combe and Co. might not have rested on the strength of the deposit made to themselves. The Lord Chancellor, however, dismissed the petition on the ground

that the petitioners were bound by the recital in the defeasance, viz. *that Morgan had deposited the deeds.*

If the creditor by his bill, or in case of his debtor's bankruptcy, by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor by his answer to the bill, or by affidavit in bankruptcy, deny the fact, the Court will direct an inquiry to be made by the Master or the Commissioners, in respect of what debt the deposit was made (*m*).

If the title deeds of the house engaged in trade are deposited to secure a debt, and the premises are sold together with the *good-will* of the business, the equitable mortgagee will be entitled to the whole of the purchase money (*n*).

The Court will, on bill filed by the party holding the deeds, order a sale (*o*).

The equitable depositor will, as in the common case of mortgage security, have six months given to him to redeem (*p*).

If there is written evidence attending the deposit of the title deeds, the mortgagee will be entitled to

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(*m*) *Ex parte* Mountfort, *supra.*

(*n*) Chissum *v.* Dewes, 5 Russel, 29.

(*o*) Pain *v.* Smith, 2 Mylne & Keen, 417.

(*p*) Parker *v.* Housefield, ibid. 419.

the costs of his petition for a sale; but otherwise not (*q*); and if there is a deposit of freeholds and leaseholds with written evidence only quoad one set of deeds, an order for sale will be obtained subject to the payment of costs by the mortgagor (*r*).

On a review of the decided cases establishing this mode of mortgage security, it is perhaps to be regretted, that the old law was not adhered to, and the principle on which the statute of frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree opened to fraud and perjury; nor does a creditor seem to deserve much favour who will not be at the trouble of a few lines in writing (*s*) if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *Ex parte* Mountfort (*t*), or if he insist that the deeds were not delivered by way of deposit, but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon (*u*), "the mischief of all these cases is, that the Court is deciding upon parol evidence with regard to an interest in land within the statute of frauds."

(*q*) *Ex parte* Brightens, 1 Swanst. 3; *Ex parte* Trew, 3 Madd. 37 n.; *et vide* Anon. 2 Madd. 281; *Ex parte* Sykes, 1 Buck. 349.

(*r*) *Ex parte* Robinson, 1 Dea. & Ch. 119.

(*s*) *Ex parte* Whitbread, *supra*.

(*t*) *Supra*.

(*u*) *Ex parte* Mountfort, *supra*.

CHAPTER IX.

OF WELCH MORTGAGES.

WELCH mortgages, as already remarked (*a*), closely resemble the ancient *mortuum vadium* described by Glanville, *viz.* a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the mean time shall be received by the mortgagee without account in satisfaction of interest (*b*). And this was also formerly a common mode of mortgage in Ireland (*c*). No covenant for payment of the debt on the part of the mortgagor is inserted in the mortgage deed (*d*), and the mortgagee has no remedy to compel redemption or foreclosure in equity (*e*)*. If the amount of rents and profits be excessive, the Court will on bill filed by the mortgagor decree an account, notwithstanding the agreement that the profits shall be retained in lieu of interest (*f*); and probably in the present day the Court would in every instance decree an account against the mortgagee of the rents and profits, whether the value was excessive or not.

(*a*) *Supra*, page 9.

(*b*) *Vide* Talbot *v.* Braddyl, 1 Vern. 395.

(*c*) Hartpool *v.* Walsh, 5 B. P. C. 275.

(*d*) Lawley *v.* Hooper, 3 Atk. 280; King *v.* King, 3 P. Wms. 361.

(*e*) Howell *v.* Price, Prec. Ch. 423.

* *Quære.*—Whether the mortgagee might not maintain an action of debt on the loan, for every mortgage implies a debt. See King *v.* King, *supra*; *sed vide contra*, Howell *v.* Price, *supra.*

(*f*) Fulthorpe *v.* Forster, 1 Vern. 477.

In some instances the estate is conveyed to the mortgagee and his heirs, until out of the rents and profits he shall have received principal and interest, which is *in the nature of a Welch mortgage*, and was compared by Lord Hardwicke (*g*) to a tenancy by *elegit*, so that as soon as the principal and interest were satisfied the estate ceased, and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years after the debt was satisfied, at which time the statute of limitations would have begun to run; and which circumstance would also bar the mortgagor of any equity of redemption (*h*). And his lordship said the mortgagor had the same right as the conusor under the *elegit* had, to come into a Court of Equity for an account of the rents and profits; nor would the Court relieve the mortgagee from his own contract and agreement of being subject to a perpetual account (*i*). In a similar case, time was held no bar to redemption, although by the mortgagor's own shewing upwards of sixty years had elapsed (*k*) since the mortgagee took possession.

In Hartpool *v.* Walsh (*l*), a bill to redeem a mortgage in the nature of a Welch mortgage was dismissed in the Irish Chancery, and on appeal to the English House of Lords the judgment was affirmed; but in that particular case a second mortgage had

(*g*) Yates *v.* Hambly, 2 Atk. 362.
(*h*) *Et Vide* 3 & 4 Will. IV. c. 27, s. 28.
(*i*) Yeates *v.* Hambly, *supra*.
(*k*) Orde *v.* Heming, 1 Vern. 418.
(*l*) Hartpool *v.* Walsh, *supra*.

been made to the same party, by which the mortgagor had agreed to repay the whole debt at any time *after eighteen months' notice;* and it was admitted the notice had long since been given, which reduced it to the case of a common mortgage.

In a case (*m*) heard before Lord Eldon, the doctrine of a mortgage in the nature of a Welch mortgage was fully recognized by the Court. The question came on incidentally on a motion, that one of the defendants, who was the executor of the executor of the attorney of the original mortgagee, should leave with his clerk in Court certain drafts or copies of deeds, letters, and papers, which he had by his answer admitted to be in his possession. The circumstances of the case, it appeared, were these:— Edward Charlton (under whom the plaintiffs claimed) being indebted by judgment to one Rooke in several sums of money, did, by agreement dated the 18th of April, 1747, agree to deliver up possession of the lands to the attorney of Rooke to hold to Rooke as his freehold, until he should have levied and received the amount of his debt. In 1752 Rooke assigned all the premises and the remainder of his debt to Reed (under whom the defendant Reed claimed, and who was also a judgment creditor of Charlton) and appointed Reed his attorney. Reed entered, and was possessed until his death in 1754, when Christopher Reed (who was residuary devisee, executor and residuary legatee of Reed) entered and was possessed until his death in 1778, on which the trustees and exe-

(*m*) Fenwick *v.* Reed, 1 Mer. 114.

cutors of his will entered and were possessed until 1783, when the defendant Reed entered and had been ever since in possession. Charlton died in 1767 intestate, leaving William Charlton his heir at law, who died in 1797, having devised his real estates to the plaintiff Fenwick in trust to sell. In the year 1800, Fenwick filed his bill for an account and to be let into possession, and alleged at the time Reed first took possession it was agreed between him and Charlton that Reed should retain possession, until not only the debt due to Rooke, but also the debt due to Reed, should be paid; that the whole of those debts had been fully paid; that the defendant Reed had kept accounts as mortgagee; that with respect to the objections which might arise from length of time, Charlton could not have had possession until all the debts were paid; that in 1781 a considerable part of the debts remained undischarged; and that since 1783, when the defendant Reed took possession, he had given out, that part of the debts remained unsatisfied. Reed in his answer denied the circumstances from which it was attempted to be inferred that he had treated the transaction as a mortgage, and insisted that from the length of time a release of the freehold ought to be presumed. He denied his belief of any agreement between his aucestor and Charlton, and alleged that he entered merely as creditor, having a right to redeem against Rooke. He admitted the assignment of 1752 to be in his possession, but said he had no knowledge of the agreement of 1747, except from the recitals in the assignment. The bill was amended in 1801 and 1803, and answers put in, to which no exceptions were taken. In 1807 the plaintiffs moved to file

exceptions *nunc pro tunc,* which was refused with costs. In the same year the bill was again amended, and an answer put in in 1808; from which time no further proceedings appeared until the present motion in 1816. The Lord Chancellor observed, the transaction appeared to be in the nature of a Welch mortgage, and that time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt was fully paid and satisfied; that if the assignment to Reed was only until Rooke's debt was paid, it was impossible to say the bar might not be set up in the present case, and in a future stage of the cause it might be just to determine accordingly. But on this point the answer left it doubtful, not only whether Reed took possession under an agreement to pay himself his own debt in addition to Rooke's, but if it did so, whether the amount of both the debts had even yet been satisfied by the perception of rents and profits. The Lord Chancellor then remarked, that if the present was not a case in which length of time alone would operate as a bar to redemption, the question still remained whether there were circumstances to raise the presumption of a release. The weight of long continuance of possession as a ground for such presumption, he observed, must depend most materially on the nature of that possession. And here again, there was no certainty in the case as it then stood, whether the possession by Reed, after Rooke's debt was paid, was originally adverse; or whether, at first holding by virtue of a distinct agreement with the Charltons, his possession became adverse at some period subsequent to his entering under that agreement. In the latter case, he added,

it would be much more difficult to raise the presumption contended for: these were undoubtedly points fit for future inquiry.

At the Autumn assizes for 1821 an ejectment was brought, by the direction of the Vice Chancellor, on the demise of Fenwick *v.* Reed. The question submitted to the jury was, whether a conveyance from Edward or William Charlton could be presumed? The defendant was prohibited from setting up as a defence, that the debts due or assigned to Reed were paid twenty years ago, or that the same were still unpaid. On the trial, the jury, under the direction of the judge, found a verdict for the plaintiff. On the 9th November, 1821, Serjeant Hullock moved the Court of King's Bench for a new trial, on the ground of misdirection, which was refused (*n*).

Although by the 28th section of 3 & 4 Will. IV. cap. 27, as subsequently noticed (*o*), the right of redemption by a mortgagor is lost at the end of twenty years next after the mortgagee takes possession, unless there has been some intermediate acknowledgment of right, yet it is conceived that this enactment cannot apply to the case of Welch mortgages (in which the original stipulation is, that the mortgagee shall hold and receive the rents until his debt is satisfied) unless twenty years shall have elapsed from the period when, by the receipt of the rents, the mortgage debt and interest might have been paid.

(*n*) 5 Barn. & Ald. 233. (*o*) *Vide infra.*

CHAPTER X.

OF MORTGAGES BY TENANTS IN TAIL, AND BY DEFECTIVE CONVEYANCE.

INSTANCES have occurred in which from the circumstance of the title-deeds being in the custody of a tenant for life in possession, who has refused to permit them to be inspected, or from other circumstances, a mortgage security has been taken from a person as tenant in fee, who, on further inquiry, or on subsequent inspection of the title-deeds, after the estate has fallen into possession, has proved to be tenant in tail only. In this case, if the mortgage be by demise, the mortgagee obtains a term of years determinable by entry of the issue, and if in fee, he obtains a base fee, determinable in like manner (*a*). It was indeed formerly held (*b*) that the estate of the grantee was void on the death of the tenant in tail and not voidable only, but this was overruled by Lord Holt, in Machell *v.* Clarke (*c*).

If, prior to the 3 & 4 Will. IV. cap. 74, the tenant in tail, subsequently to the mortgage and even without reference to it, levied a fine or suffered a common recovery, he would have let in the mortgage, although he declared the use of the fine or recovery to a subsequent mortgagee or purchaser without notice (*d*). If the first mortgage was in fee,

(*a*) Machell *v.* Clarke, 2 Ld. Raym. 778.

(*b*) Tooke *v.* Glasscock, 1 Saund. 260. (*c*) *Supra.*

(*d*) Poph. 5, 6; Stapilton *v.* Stapilton, 1 Atk. 8; Tourle *v.* Rand 2 B. C. C. 652; Doe *v.* Whichelo, 8 Term Rep. 214.

a subsequent legal common recovery would not have been valid without the concurrence of the mortgagee or his heirs, for the want of a good tenant of the freehold (*e*). But, on the principle of there being no degrees of estates in equity, it was decided that if *equitable* tenant in tail made a mortgage, he might suffer a recovery without the concurrence of the mortgagee (*f*).

By the recent statute of the 3 & 4 Will. IV. cap. 74, fines and common recoveries, since the 31st of December, 1833, are abolished, and entails in freehold estates have become barrable by deed of disposition inrolled in Chancery, and entails in legal copyhold estates are barrable by surrender, and in equitable copyhold estates by surrender or by deed inrolled in the Manor Court. By this statute a new legal term has been created by the substitution of a *protector*, whose consent is required in the place of the concurrence of the freeholder for life in the old assurance by common recovery, but with very considerable modifications of the law, for the purpose of more readily ascertaining the proper person to give such consent, and extending the office of protector, as well to persons having an estate of freehold, as to persons having a prior estate for years, determinable on a life or lives, and to persons who have parted with their estate, and to persons having no estate whatever, but specially appointed for the purpose.

(*e*) *Vide* Watkins on Conveyancing, 7th edition.

(*f*) Nouaille *v.* Greenwood, 1 Turner & Russell, 26.

It is intended by the statute to exclude from the office of protector all persons being bare trustees, (unless taking under a settlement executed prior to the 31st of December, 1833,) and women taking in respect of dower, and all persons intitled in respect of any estate taken by them as heirs, executors, administrators or assigns, and to vest it in the person taking the first beneficial estate for a term determinable on a life or lives, or any greater estate prior to the estate tail under the same settlement or will, whether by force of the actual limitations or by resulting use or trust; and to continue the office in such person, notwithstanding alienation, but not in his representatives, and also to vest it in any person specially appointed for the purpose. The statute contains a provision in respect of settlements prior to the first of January, 1834, in which cases the concurrence of the same person as protector is required, as would have been a necessary party prior to the statute, in making the tenant to the præcipe; and in such cases the concurrence of the *mortgagee* will be still necessary if the estate tail intended to be barred is legal.

The 21st section of the statute provides that the disposition by tenant in tail, by way of mortgage, or for any other limited purpose, shall, to the extent of the estate created, be an absolute bar in equity as well as at law, to all persons as against whom such disposition is by the act authorized to be made, notwithstanding any intention to the contrary *expressed or implied* in the deed by which the disposition may be effected, provided, that if the estate created by such disposition shall be only an estate

pur autre vie, or for years absolute or determinable, or if an interest, charge, lien or incumbrance shall be created, without a term of years absolute or determinable, or any greater estate, for securing or raising the same, such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary *expressed or implied* in the deed by which the disposition may be effected.

The practical effect of this clause appears to be, that in case tenant in tail creates a charge on the estate by way of demise for a term of years, or *pur autre vie*, or by way of mere charge without any actual estate, the issue in tail and remainder-men will be entitled, subject to the charge or incumbrance so created, notwithstanding any intention declared in the deed to the contrary, as, for example, the insertion of a proviso, making the estate redeemable by the mortgagor or *his heirs*. But if tenant in tail creates any interest by way of mortgage, exceeding his own life estate, and which in all probability will be in fee, the issue in tail and remainder-men will be bound by it both at law and in equity, although the estate be made redeemable by the mortgagor or *the heirs of his body*, or other the persons who would have been entitled under the old limitations, in case the same had not been barred; so that it would seem to be the intention of the framers of the act in such latter case to require *a new set of limitations by way of resettlement*, unless the sole intent of the instrument be to let in the mortgage.

The clause is rather obscurely worded, and its provisions appear somewhat arbitrary.

If the mortgage is in fee, and it is intended to re-settle the estate to the old uses, the limitations must *not* be introduced into the proviso for redemption, and it may be *prudent* to make the new settlement by a distinct deed, although it is presumed the statute does not prevent a re-settlement by the deed of mortgage, if the object is effected by a distinct set of limitations.

If the mortgage be for a term of years, it is presumed the statute does not prohibit the introduction of further limitations of express uses.

In respect of estates voidable through the defective assurance of tenant in tail, the 38th section of the act has mainly followed the common law, by enacting that a voidable estate created in favour of a purchaser (or mortgagee) for a valuable consideration, shall (so far as a subsequent assurance by the tenant in tail can operate under the provisions of the act) be confirmed by such assurance. But the statute has altered the common law, by introducing an exception in favour of a purchaser not having express notice of the first assurance, and consequently such purchaser, although he may have notice by *implication* of the defective assurance, yet, if he has not express notice, will not be bound by it.

The mortgagee may by bill in equity *compel* the

mortgagor tenant in tail, to perfect the title, but the Court will not point out *what title* the mortgagor shall make; it will decree him to make such title to the mortgagee as he is capable of doing (*g*).

It must be always borne in mind that the issue in tail claiming *per formam doni* will not be bound by their ancestor's contract (*k*).

Prior to the 3 & 4 Will. IV. cap. 74, a question was entertained in the case of a tenant in tail *becoming a bankrupt* after creating the mortgage and before perfecting the assurance. By the statute 21 James I. c. 19, s. 12, the commissioners of bankrupts were authorized "by deed enrolled to grant, bargain, sell and convey all manors, &c. whereof any bankrupt was or should be seised of any estate tail, in possession, reversion or remainder to any person or persons *for the benefit of the creditors of such bankrupt*, and it was declared that such grants and sales should be good in law against such bankrupts, the issues of their bodies, and against every person claiming any estate, right, title, or interest under such bankrupts, after such time as such persons should become bankrupt, and against every person whatsoever, whom such bankrupts by common recovery or otherwise might cut off, or bar from any remainder, reversion, rent, profit, title or possibility, in, to or out of any of the said manors, &c."

(*g*) Sutton *v.* Stone, 2 Atk. 101.

(*k*) Stapilton *v.* Stapilton, *supra*.

It was questioned whether the bargain and sale of the commissioners would have the like effect, as the fine or common recovery of the tenant in tail, if levied or suffered before he became bankrupt, would have had, in letting in the mortgage incumbrance. A variety of cases have decided, that generally speaking, the assignees of a bankrupt stand in the place of the bankrupt himself (*i*), and it would seem to follow, that as the mortgagor, notwithstanding the defect of the assurance, could not have made entry on the premises to defeat the mortgage, the assignees claiming under him must have been equally estopped both at law and in equity from disputing the assurance; and that as the bargain and sale would operate as a common recovery, if the mortgagor was tenant in tail in possession, and as a fine, if he was tenant in tail in remainder, and therefore would, in the first instance, bar the issue and the remainders over, and in the second instance, bar the issue, the mortgage title must, to the extent of the bargain and sale in barring the issue and remainders, have been ratified and confirmed.

The contrary was however decided in a case heard at law before Lord C. J. Lee, and Justices Wright, Foster and Denison (*k*): the question arose on an action of ejectment brought by the assignees of

(*i*) Mitford *v.* Mitford, 9 Ves. jun. 100, *et vide* 2 Vern. 429, case in note; Co. Bank. L., 325; 2 Salk. 449, note.

(*k*) Beck *v.* Welsh, 1 Wils. 276.

bankrupt tenant in tail, who was then dead, but who, prior to his bankruptcy, had mortgaged the lands to the defendant for 500 years. The Court, after admitting that if the tenant in tail had suffered a recovery, he would have let in the mortgage, held, "that the statute of 21 James I. c. 19, s. 12, was made for the benefit of creditors who had no specific lien upon the lands of a bankrupt, and not for any particular creditors, who relied upon the title they accepted; that tenant in tail without suffering a recovery could only affect the estate *for his own life*, and he being now dead *the mortgagee's title was at an end;* and the statute never intended to put the prior incumbrancers on an estate tail in better case than they would have been if the statute had never been made. It would be very strange to say that this statute, which was most plainly made for the general benefit of all the creditors, should have an effect quite contradictory thereto, viz. to make good a defective title to a particular creditor." It was impossible the legislature could ever intend any such thing; so without saying any more, though this were a new case, yet the Court were all clear of opinion that judgment must be for the plaintiff."

It may be remarked, that in this case the Court seem to have proceeded on the law laid down in Tooke *v.* Glasscock, rather than in that of Machell *v.* Clarke, and to have considered the term of 500 years to have *ipso facto* ceased on the death of the tenant in tail, rather than as voidable by entry. It is indeed impossible to reconcile the judgment in

Beck *v.* Welsh, in favour of the plaintiffs in ejectment, with the law in Machell *v.* Clarke; for if the mortgage term was voidable only and not void, on what principle could *the assignees* make entry in derogation of the act of the person in whose place they stood? Is it not probable, that had the Court in Beck *v.* Welsh, put that construction on the act of tenant in tail, which, since the case of Machell *v.* Clarke, has generally been considered to be the right construction, viz. that his assurance was not avoided by his death, but voidable only, the decision would have been in favour of the defendant?

The 3 & 4 Will. IV., cap. 74, s. 62, would seem to have put an end to all future doubts on this subject, by enacting that a voidable estate created by tenant in tail in favour of a purchaser for a valuable consideration, shall be confirmed by the *disposition of the commissioners,* (so far as the assurance can operate under the provisions of the act,) unless such disposition shall be made to a purchaser for a valuable consideration without express notice. And by the act the commissioners are directed to convey to purchasers the estates of bankrupt tenants in tail(*l*), and the assignees are authorized *ad interim* to receive rents and enforce covenants (*m*).

The reader need not be reminded that by the 1 & 2 Will. IV. (*n*) the bargain and sale of the commissioners in bankruptcy has been dispensed with, except

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(*l*) Sections 57, 58, 59. (*m*) Section 67.
(*n*) 1 & 2 Will. IV. c. 56, s. 56.

in cases of copyholds (*o*) and the estates of tenants in tail.

It had been decided prior to the statute of the 3 & 4 Will. IV. that relief might in equity be had against the assignees of bankrupt tenant in tail in the case of a defective assurance, if there was in the mortgage-deed *a covenant for further assurance.* In a case heard before Lord Northington (*p*), it appeared that tenant in tail had executed a trust-deed for the benefit of his creditors, and therein had *covenanted* to convey to the trustees for sale his remainder in tail expectant on the decease of his mother in divers estates; and had covenanted generally for further assurance. A commission of bankrupt was afterwards issued against the tenant in tail by one of the creditors, parties to the trust-deed, and he and another were chosen assignees, to whom the usual bargain and sale was executed by the commissioners; the assignees filed their bill to set aside the trust-deed; the Court directed the parties to try their rights at law; and the trustees obtained a verdict: after this the tenant for life died, and the trustees filed their bill against the assignees to have the estate delivered to them. Both causes came on together, when Lord Northington confirmed the trust-deed, and directed the assignees to join in conveying all their estate and interest in the lands to the trustees, or as they should appoint, his lordship being of opinion that *as the estate was bound by a specific covenant for further*

(*o*) See 6 Geo. IV. c. 16, s. 68.

(*p*) Edwards *v.* Applebee, 2 B. C. C. 652, note.

assurance from the bankrupt, the trustees were become entitled to that interest which on the bankruptcy, and the operation of the law thereon, was then vested in the assignees; and he dismissed the bill filed by the assignees with costs.

It may be observed, that in the last-mentioned case there was only a covenant on the part of the tenant in tail to convey, and not an actual conveyance. In Tourle *v.* Rand (*q*), there was an actual conveyance by tenant in tail in remainder, expectant on his mother's death, to the mortgagee, with a covenant for further assurance. The mortgagor afterwards became bankrupt, without levying a fine or suffering a recovery. The question agitated in that case was, whether the mortgagee, not having the title deeds, should be postponed to a subsequent mortgagee, to whom they had been delivered after the estate fell into possession. The Chancellor determined he should not, for he could not have compelled the tenant for life to give up the deeds. The counsel for the assignees then contended, on the authority of Beck *v.* Welsh, that the mortgage would be good only during the life of the tenant in tail; to this Lord Chancellor Thurlow replied, "that point does not arise, yet if tenant in tail mortgage and afterwards suffer a recovery, it will make good the former title; *the covenant for further assurance* might be taken hold on as a plank."

The precise point was subsequently heard before Lord Thurlow (*r*). Tenant in tail mortgaged to the

(*q*) Tourle *v.* Rand, *supra*.

(*r*) Pie *v.* Daubuz and another, 3 Bro. C. C. 595.

plaintiff *in fee*, with covenant for further assurance; the mortgagor became bankrupt; a bill was filed by the mortgagee against the assignees, alleging that the plaintiff had discovered, since the bankruptcy, that the mortgagor was only tenant in tail, *and that the fee simple was vested by the bargain and sale in the defendants*; and he insisted that by virtue of the covenant he was entitled to call on the assignees to make further assurance of the premises to him. The assignees, in their answer, submitted to act as the Court should direct. The counsel for the mortgagee cited Taylor *v.* Wheeler and Edwards *v.* Applebee; the assignees relied on Beck *v.* Welsh. The Solicitor General in reply urged, that the equity arose from the bankrupt's having agreed that the land should be charged, which agreement would bind the land in equity, and that the plaintiff might call upon the assignees to make good the title by further assurance, just as the bankrupt ought to have done. The Lord Chancellor, after saying that the cases appeared to be directly contradictory, and that the argument of the Court in Beck *v.* Welsh did not appear to him satisfactory, and that he should have agreed with Lord Northington in a different construction of the statute, conceiving its object only to be saving the expense of a recovery, and that this effect would be to let in the incumbrance and to convey not only all that the bankrupt had conveyed but more, and therefore if the case of Beck *v.* Welsh had not been cited, he should have adopted Lord Northington's construction, ultimately decreed that the defendants should redeem the mortgage or stand foreclosed, and execute a proper conveyance of the premises to the plaintiff and his heirs. It is presumed that since

the passing of the statute, the mortgagee having a covenant for further assurance, may, if necessary, *compel* the assignees to redeem or to cause the mortgage to be perfected by the disposition of the Commissioner in bankruptcy.

If a mortgage or sale be made by a defective conveyance, such as a feoffment without livery, a bargain and sale without enrolment, or the like, equity will give the mortgagee or purchaser relief against the mortgagor, or, in case of his bankruptcy, against his assignees; for (as remarked by Lord Eldon in Mestaer *v.* Gillespie) (*s*), the very instrument being only inchoate and not complete to pass the property, is in equity *evidence of an agreement* to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the money. An instance of this is to be found in the case of Taylor *v.* Wheeler (*t*), in which a surrender of copyholds by way of mortgage having become void for want of presentment in due time, relief was decreed for the mortgagee against the assignees of the mortgagor who had become bankrupt, and who, Lord Cowper observed, "was plainly bound in equity by the defective conveyance, *et come moy semble* he became a trustee for the mortgagee."

The like relief will also, it is said (*u*), lie for a defective purchaser or mortgagee against subsequent

(*s*) 11 Ves. jun. 625.
(*t*) Taylor *v.* Wheeler, 2 Salk. 449.
(*u*) *Vidé* 5 Bac. Ab. 43, *et infra*.

judgment creditors, who, having only *a general lien* on the land, did not *originally* rely on the land for their security, and therefore have not equal equity to have the land applied for payment of their debts. The ruling case cited for this doctrine is that of Burgh *v.* Francis (*x*), which was however decided under peculiar circumstances. Henry Francis, in consideration of 400*l.* by feoffment, on the 17th of July, 1665, mortgaged to Henry Burgh in fee, *but no livery was made thereon;* and he covenanted for himself and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment free from incumbrances against himself and his heirs, and all persons claiming under him, with covenant for further assurance. Francis, in 1670, made his will, and thereof appointed Henry Francis, his son, executor. Afterwards Robert Burgh died, and the plaintiff, Eleanor, proved his will. The defendant, Henry Francis, confessed judgments on bonds entered into by his father, viz. several as heir and one as executor to his father. One of these judgments was obtained by Heyman, a plaintiff in an action brought in Hilary Term, 1670, for 400*l.*; and all the other judgments were entered about the same time. This cause came to be heard by Sir Heneage Finch, Lord Keeper, assisted by Judge Wyld, who declared that the Court was fully satisfied that the plaintiff ought to be relieved, and that the said judgments ought not to encumber the premises till the mortgage money was fully paid, wherein the Court did not

(*x*) Burgh *v.* Francis, 5 Bac. Ab. 41; Finch's Rep. 28; Nelson's Rep. 183.

ground its judgment upon the manner of obtaining the judgments all in a term and most of them together, nor on the special way whereby the heir charged the lands by pleading *riens per descent*, nor on the propriety of the teste of the subpœnas before the teste of the originals on which the judgments were grounded, but upon the true nature of the case: the Court declared that the debt due by the mortgage did originally charge the lands, which the bonds did not till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in prejudice of that equity, and the rather because of the covenant for further assurance; and though the mortgage was defective in law for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors had no notice, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, *viz.* to be postponed to the mortgage. Therefore, it was decreed that the defendant Henry should convey to the plaintiff, or her assigns in fee, in manner as a Master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them since the date of the mortgage; and he who had the equity of redemption might in convenient time bring a bill to redeem, and in default thereof the plaintiffs might bring one to foreclose, and a perpetual injunction was also awarded to quiet the plaintiffs and their assigns in possession against all the defendants and the afore-

said incumbrancers, and to stay all proceedings at law.

To this case in Bacon's Abridgment (*y*) the following reason is subjoined.

"From this case, which hath been a governing case in the Courts of Equity, they have stated the difference before-mentioned, for these *bond creditors* did not originally pitch upon the land as a pledge and security for their money; and when they came afterwards and reduced their securities into judgments to affect the lands, yet since they affect it in the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place, and therefore must be subject to the defective security. But otherwise it had been if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective securities that could not prevail at law should not overturn in equity a security that was equally upon valuable consideration. But *the bonds* in the former case did not originally take hold of the land at all; and when they were reduced to a judgment they only took hold of the land together with other things; and therefore equity doth not look on them as such charges on the land as are to take hold so imme-

(*y*) Vol. v. p. 42.

diately on it, that a prior defective security is not to be relieved and set up against them, especially since such incumbrancers did not take the land as an original security, but came in afterwards under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage we must in all manner of justice suppose that the mortgagee would not have lent if the land had not been offered to secure his money; and therefore when he hath the title at law it is no equity to overturn it, or to postpone him to a defective security. But in the case of *the bonds* the obligees lent their money upon the personal security, and not on the credit of lands, and therefore when they come to affect the lands they must stand in the place of the person that had made himself liable in a Court of Equity to answer and make good the defective security."*

* It may perhaps be fairly doubted whether the case of Bush v. Francis can be considered an authority for the general doctrine, that equity will in every case postpone a subsequent judgment creditor to a prior defective mortgagee. And it is submitted, there are forcible arguments to the contrary of such a doctrine; for in the first place, as observed by Mr. Fonblanque, (Vol. I. Treatise on Equity, 38,) the general rule is, that a Court of Equity will not interpose in prejudice of a defendant having a legal interest, for a valuable consideration, and without notice of the plaintiff's equity. And, secondly, as the defect arises from the neglect of the mortgagee himself, he would not appear entitled to much favour in equity, to the prejudice of a more prudent creditor. The point, however, must be left to the reader's judgment.

From Lord Nottingham's notes it appears that the judgments were obtained after the service of the subpœna in equity, although before the return of it, and he decreed that the heir should execute a conveyance to the mortgagee, who should hold the redemption discharged of the judgments; "Wherein," says his lordship, "I did not rely upon the legal notice of *lis pendens*, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be encumbered by the heir, for a purchaser without notice of a trust may be free, but an encumbrance is not like a sale (*z*)." The latter part of Lord Nottingham's remark must, it is submitted, be confined to an encumbrance by way of judgment.

Mr. Powell, in his Treatise on Mortgages (*a*) seems to have considered, that even if the second mortgagee have *notice* of the prior defective mortgage he must prevail against the first mortgagee, because, he says, the legal title was *ab initio* in the second mortgagee, and equity will not interfere to wrest it from him where both are equally upon a valuable consideration; and he considers the next mentioned case to have been decided upon this ground, for, he says, unless the subsequent purchaser for a valuable consideration, in that case, could have been charged with fraud, by reason of notice, there appears to be no pretence upon which the prior purchaser for valuable consideration like-

(*z*) 3 Swanst. 536, note.

(*a*) Page 538, 4th edit.; *et vide* 1 Eq. Ca. Ab. 320, S. P.

wise, but whose title was defective, could apply for relief, because, as between two purchasers upon the like considerations, that which has the complete title in law must prevail.

In this view of the case, however, Mr. Powell was certainly mistaken, for a mere statement of the circumstances will show that the securities of both parties were not only equally for a valuable consideration, but they had also *equal equity*, which would not have been the case had the second mortgagee taken *with notice* of the first encumbrance, and in fact it is expressly stated that he had *not* notice. The circumstances were (*b*), Richard Wiseman, son and heir apparent of Sir Richard Wiseman, intermarried with Winefred Barrington, entitled to a portion of 4000*l.*, and brought his bill against the trustees of his wife; whereupon a decree was had to pay to him the fortune of his wife, upon making a competent settlement, and upon failure thereof the fortune to be invested in lands with the approbation of the master. But upon the Master's report that no competent settlement could be made by Richard the son, it was by choice of parties invested in lands of Sir Richard the father of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited and declared, apart from the freehold, to be to the use of the issue of the marriage in common form, and afterwards in fee to the son, *with a covenant* from Sir Richard to surrender the copyhold. The wife died without issue, and the son, for

(*b*) Oxwick v. Plumer, 5 Bac. Ab. 43.

a valuable consideration, mortgaged both copyhold and freehold together to Oxwick and others, plaintiffs, but without any surrender. The son died, and the lands descended to Elizabeth, his sister and heir at law. The mortgagees foreclosed Elizabeth by a decree of the Court, and entered and took possession; to whom, being in possession, Elizabeth released and confirmed the estate in fee. Sir Richard, the father, being out of possession of the premises from the time of the settlement, which was made thirteen years past, surrendered the copyhold land to defendant Plumer for a valuable consideration. Plumer was admitted, and brought his ejectment; and the mortgagees brought their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bills with costs; and held that the Court would not supply the defect of a surrender against a person that came in by title upon surrender of the same premises. The case coming on to be reheard before Lord Cowper, he was of the same opinion; and he took this difference, that when there are two persons that *have equal equity*, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have gained at law; as where A., B. and C. are three mortgagees, and C. purchases in the mortgage of A. to secure his own money *bonâ fide* lent, equity will never take from him the legal interest he hath gained (*c*). But if the contending parties in equity *have not equal equity, then those that have the greatest*

(*c*) *Sed vide infra.*

equity shall prevail against the legal title, as if a creditor takes hold of the land by a feoffment in mortgage without livery, equity will supply the defective conveyance against a subsequent judgment creditor, because the judgment creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt as he that took it in mortgage(*d*). But in the principal case, where Plumer had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender, so that the legal interest was in him, the covenant to surrender (though prior) could not be set up against him *who had no notice of it,* but Oxwick must pursue his remedy at law for the breach of the covenant.

And indeed a case which is afterwards animadverted upon by Mr. Powell, though on a different subject, was decided against a subsequent purchaser, on the ground of notice of the prior defective mortgage(*e*). In that case it appeared that a surrender of copyholds had been made by way of mortgage, which had become void for want of presentment. Afterwards Blincowe (one of the defendants) agreed with the mortgagor for the purchase of the copyholds, and took a surrender in the name of Moore (another of the defendants) who afterwards agreed to become the purchaser, and paid the purchase-money without notice of the mortgage,

(*d*) *Vide supra,* page 254, note.

(*e*) Jennings *v.* Moore and others, 2 Vern. 609.

and was admitted. On a bill filed by the executor of the mortgagee, Moore pleaded he was a purchaser for a valuable consideration without notice; but it was proved that Blincowe had notice of the mortgage, and it was adjudged that although Moore had not notice of the mortgage, nor employed Blincowe originally as his agent, yet his subsequent approval of the contract made Blincowe his agent *ab origine* so as to affect him with notice, and he was decreed to pay the 400*l.* and interest, or to surrender to the plaintiff. In this case, the principle contended for is clearly recognized, although the propriety of its application may be doubted.

The result of the cases seems to be, that if tenant in tail, prior to the 3 & 4 Will. IV. cap. 74, made a mortgage security without fine or recovery, and afterwards levied a fine or suffered a common recovery, he let in the assurance.

That since the passing of the statute the subsequent disposition by tenant in tail or by commissioners in bankruptcy will (so far as the instrument can take effect under the provisions of the statute) operate to confirm a prior defective assurance, unless such second assurance be made to a purchaser for a valuable consideration not having express notice.

That if tenant in tail shall have made a defective mortgage, he may be compelled by bill in equity to perfect the assurance.

That if, prior to the 3 & 4 Will. IV. cap. 74, tenant in tail became bankrupt before perfecting the mortgage security, and there was a covenant for further assurance in the mortgage deed, equity would hold the assignees bound to make good the defective security, and decree them to redeem or be foreclosed, and to convey to the mortgagee; and it is presumed, that since the statute the mortgagee has a similar equity.

That in the instance of a defective assurance made by tenant in fee or other person having an absolute interest, the assignees will be bound to make good the security with or without a covenant for further assurance, on the general equity between the parties.

It is said that creditors, having a subsequent valid security, but amounting only to a general lien on the estate (such as a judgment) will be bound by the prior defective conveyance, as their security did not *originally* affect the lands; as will also a subsequent mortgagee, who has obtained an actual valid assurance, but *with notice* of the prior defective mortgage.

It was doubtful, prior to the 3 & 4 Will. IV. cap. 74, whether equity would (as against the assignees) relieve a mortgagee who had taken a defective assurance from a tenant in tail without a covenant for further assurance; but, as before observed, the disposition by the commissioners will, in all cases, perfect the assurance since the statute, except as against a purchaser not having express notice.

Lastly, a subsequent mortgagee *without notice* hav-

ing a perfect title, will have preference both at law and in equity to the defective assurance, whether taken from a tenant in fee or tenant in tail, or any other person.

It is hardly necessary to repeat, that a defective assurance made by tenant in tail will not bind his issue inheritable under the entail at law or in equity, whether there be a covenant for further assurance or not (*f*).

(*f*) Stapilton *v.* Stapilton, 1 Atk. 9; Fox *v.* Crane, 2 Vern. 306; Saville's case cited in Attorney-General *v.* Day, 1 Ves. 224, and in Hinton *v.* Hinton, 2 Ves. 632; Hayward *v.* Stillingfleet, 1 Atk. 423.

CHAPTER XI.

OF MORTGAGE OF TOLLS.

THERE are some peculiarities requiring attention in the Law of Mortgage of Turnpike Tolls.

By the general turnpike act it is provided, that it shall be lawful for the trustees or commissioners of any turnpike road to borrow and take up at interest, on the credit of the tolls arising on such road, such sum or sums of money as they shall from time to time respectively think proper, and to demise and mortgage the tolls on such road, or *any part* or parts thereof, and *the turnpikes and toll-houses* for collecting the same, (the costs and charges of which mortgages shall be paid out of the tolls,) as a security to any person or persons, or their trustees, who shall advance such sum or sums of money, which mortgages shall be in the words or to the effect following, (that is to say)

" By virtue of an act passed in the year of the " reign of , intituled (here set forth the title of " the act); We, whose hands and seals are hereunto " subscribed and set, being of the trustees " (or commissioners) for putting into execution an act " passed in the year of the reign of , in-

(a) 3 Geo. IV. c. 126, sec. 81.

" tituled (here set forth the title of the act under " which the trustees or commissioners borrowing the " money and granting the mortgage shall act), in con- " sideration of the sum of sterling, advanced " and paid by A. B., of , to the treasurer of " the said trustees (or commissioners), do hereby " grant and assign unto the said A. B., and his exe- " cutors, administrators and assigns, *such proportion* " of the tolls arising and to arise on the said turn- " pike road, *and the toll gates and toll houses* erected " or to be erected for collecting the same, *as the said* " *sum of doth or shall bear to the whole sum* " *now or hereafter to become due and owing on the* " *security thereof.* To have, hold, receive, and take " the said proportion of the said tolls, toll-gates, toll- " houses and premises, with the appurtenances, unto " the said A. B., and his executors, administrators, " and assigns, for and during the residue of the term " for which the said tolls are granted by the said " last-mentioned act, unless the said sum of , " with interest, after the rate of £ per cent. per " annum shall be sooner repaid and satisfied. Given " under our hands this day of ."

And copies of all such mortgages are to be entered in a book to be kept for that purpose by the clerk or treasurer to the said trustees or commissioners, for which entry such clerk is to be paid the sum of 5*s.*, and no more, out of the tolls payable on such roads, and which said book may, at all seasonable times, be perused and inspected without fee or reward; and it shall be lawful for all persons respectively, to whom any mortgage shall be made as aforesaid, or

who shall be from time to time entitled to the money thereby secured, to assign or transfer his, her, or their right, title and interest in and to such mortgage, and the principal money and interest thereby secured, to any other person or persons whomsoever, which assignment or transfer may be made in the following words, or words to the like effect, to be indorsed on such mortgage security, or to be underwritten or thereunto annexed, and signed in the presence of and attested by one or more credible witness or witnesses, (that is to say):

"I, A. B., (or, I, C. D., assignee, executor, or administrator of A. B., as the case may happen,) do hereby assign and transfer this mortgage security, with all my right and title to the principal money thereby secured, and all interest due and hereafter to grow due upon the same, unto E. F., his or her executors, administrators and assigns. Dated this day of 18 .

Witness, G. H. (Signed) A. B. or C. D."

Which transfer shall be produced and notified to the clerk or treasurer of the said trustees or commissioners, within two calendar months next after the day of the date thereof, who shall enter the same in the said book, for which entry the said clerk or treasurer is to be paid the sum of five shillings, and no more, and such transfer shall then entitle such assignee, his executors, administrators and assigns, to the full benefit of such mortgage security, and every such assignee may, in like manner, assign or transfer the same, and so *toties quoties*; and it shall

not be in the power of any person or persons (except the person or persons to whom the same shall be transferred, his, her, or their respective executors or administrators) to release, discharge or make void the original mortgage security, or the monies due thereon, or any part thereof; and all persons to whom any such mortgage or transfer shall be made as aforesaid, shall, *in proportion* to the sum or sums of money thereby secured, be creditors on the tolls by such act granted, and on the said toll-gates and toll-houses, in equal degree one with another, or in such order as shall be agreed upon and stipulated by the said trustees or commissioners at the time of the advance of their respective shares.

And, that if any person (*b*) shall agree to advance any sum to be employed in the making or repairing of any turnpike road, or highway intended to be made turnpike, and shall subscribe his name to any writing for that purpose, every such person shall be liable to pay every such sum so subscribed, according to the purport of such writing, and in default of payment thereof, within twenty-one days after the same shall become payable according to the purport of such writing, and shall be demanded by the person to whom the same is made payable by such writing, or if no person be named therein for that purpose, by the treasurer of such turnpike or intended turnpike road, it shall be lawful for every such treasurer or other person to sue for and recover the same in any of his majesty's courts of record,

(*b*) Sec. 82.

by action of debt or on the case, or by bill, suit or information, wherein no essoign, protection or wager of law, nor more than one imparlance, shall be allowed.

And that every mortgagee (*c*) that hath taken or been in possession, or shall take or be in possession of any toll-gate or bar set up or erected on any turnpike road, or of any lands or tenements, the rents whereof are appropriated to the repairs of any part of the turnpike road, shall, within twenty-one days after he shall have received notice in writing from the trustees or commissioners of such turnpike road, render an exact account in writing to such trustees or commissioners, or to such person as they shall appoint, of all monies received by such mortgagee, or by any other person or persons for his use and benefit, or by his authority, at such toll-gate or bar, or otherwise, and what he hath expended in keeping or repairing the same; and in case he shall neglect to render such account when required as aforesaid, he shall forfeit and pay to the said trustees or commissioners, for every refusal, neglect or omission, the sum of 50*l.*, to be applied to the use of the road on which such toll-gate or bar shall be erected.

And that (*d*) if any such mortgagee shall keep possession of any toll-gate or bar, by himself, or by any other person or persons on his behalf, and receive the tolls or duties thereat, or of any such rents and

(*c*) Sec. 47. (*d*) Sec. 48.

profits as aforesaid, after such mortgagee shall have received the full sum or sums of money due on his respective mortgage, and the interest thereof with costs, such mortgagee shall forfeit and pay, as a penalty, to the trustees or commissioners, double the sum or sums of money he shall have received over and above the sum of money due as aforesaid, with treble costs of suit, to be recovered by the treasurer or clerk to such trustees or commissioners, by action of debt, bill, plaint or information, in any of his Majesty's Courts of Record, which, when recovered, shall be applied to the use of the respective road on which such toll-gate or bar shall be placed, or such rents appropriated.

And that (*e*) if any mortgagee of any tolls, toll-gate, bars, chains, toll-houses and buildings on any turnpike road, shall seek to obtain the possession of the said toll-gates, bars, chains, toll-houses and buildings, in order to pay himself the principal money and interest, or any part thereof, due to him, it shall be competent for him, as lessor of the plaintiff, and upon his demise only, and without uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person who shall obtain the possession thereof shall not apply the tolls which may consequently be received by him, to his own exclusive use and benefit, but to and for the use and benefit of *all the mortgagees* of the same premises, *pari passu*, and *in proportion to the several sums which may be due to them as such mortgagees*.

(*e*) Sec. 49.

The effect of this statute appears to be, to vest in the mortgagees *pro tempore* of the tolls of any turnpike, without distinction as to the order of the dates of their respective securities, the entire legal estate in the tolls, toll-houses and gates, subject to open and let in any other mortgagees to equal rights, and to enable any one of the mortgagees, without the concurrence of the rest, to obtain possession of the toll-houses and receive the tolls, and thereout to retain his own just proportion, and to pay the remainder among his co-mortgagees, according to their respective proportions, but without any preference or priority.

In a case which occurred prior to the passing of this general act (*f*), it was decided, that under an authority contained in a local act to mortgage the tolls *without any mention of the toll-houses or gates*, the latter could not be mortgaged, although it was evident the possession of them was necessary to the receipt of the tolls, and it was also decided, that as the trustees were acting officially, and for the public benefit, they were not estopped (although parties to the deed) from insisting that they had no power to make such a demise. It may be remarked, that in this case the mortgage was made of the entirety of the tolls, and not of a proportion of them, although the act declared there should be no priority between the mortgagees. Mr. Justice Ashhurst, in giving judgment, observed, that the act expressly gave the trustees power to mortgage the tolls, but the reason why

(*f*) Fairtitle v. Gilbert and others, 2 Term Rep. 169.

it did not give them a further power was, because no creditor was to have preference. Now, if any creditor had a power to enter and take possession of the toll-gates he would gain a priority, which the act had denied." On this Lord Eldon, when Chief Justice of the Common Pleas, took occasion, in the case of Doe on demise of Banks *v.* Booth (*g*), to remark, that the reason why the creditor, in the case of Fairtitle *v.* Gilbert, would have gained a preference was, that the mortgage was of the whole of the tolls and not of a proportion of them, for he denied he would have had priority, if the mortgage had been of a proportion of the tolls, although the act had authorized a demise of the toll-houses, inasmuch as the mortgagee in possession might have been a bailiff or trustee for the others of their respective shares; and therefore in the principal case he decided that a mortgagee of a *proportion* of the tolls might maintain ejectment for the *toll-houses*, the local act then under consideration having authorized a demise of them. In this case it was contended, that the legislature could not have intended that any one of the mortgagees should take possession of the toll-houses and gates and receive all the tolls, but that the trustees were to act for all the parties, and, like other public officers, might be punished for any misapplication of the money entrusted to them, as the mortgagees might recover their proportion of the money, when collected, in an action for money had and received. To this mode of reasoning Lord Eldon

(*g*) 2 Bos. & Pull. 223.

replied, that there was a great difference between a demise of tolls and of toll-houses—the former only gave a personal interest in respect of which an action for money had and received might be maintained; the latter gave an interest in land which was within the statute of mortmain, and that the money advanced by the mortgagee would be very ill secured if his only remedy was either an application to the vindictive power of the King's Bench or a suit in Chancery, in which all the other thirty-five mortgagees must be made parties; and with respect to the action for money had and received, it would be a sufficient defence for the trustees to show, that they had distributed all the money received according to the provisions of the act.

It will be seen that the view taken by Lord Eldon has been adopted by the legislature in the general act, and that the 49th section of that act is a legislative expression of that decision.

In a case decided (*h*) since the passing of the general act, the doctrine laid down in Doe *v.* Booth, was carried out to an extent which was considered doubtful by one of the judges who heard the cause. It appeared that by a local act, certain tolls were granted, subject to the payment of tolls borrowed on the credit of former tolls, and to be borrowed on the tolls granted by that act, without preference, among the creditors, in respect of priority of mortgage.

(*h*) Doe *v.* Lediard, 4 Barn. & Adol. 137.

Under this act, mortgages to the amount of 17,000*l.* were granted, secured on grants of proportion of the tolls, and by a demise of the toll-houses, in the form prescribed by the general act.

After this an act was passed for making a branch road to communicate with the former, and by which it was declared that the former act should be as valid and effectual for carrying this act into execution as if re-enacted therein, and tolls were granted on the branch road to be applied like the former tolls, and to be liable to all the debts on those tolls; and it was provided, that all monies then due on the credit of the said tolls, and also all such monies as might thereafter be borrowed for making the several branches of road to be made by virtue of the former act, with interest, "*should have and be entitled to a preference and priority of charge and payment,*" to and before any sums of money to be advanced by any person on the credit of the tolls to be granted by either of the acts for making the new branch road thereby authorized to be made. The trustees under the two acts borrowed 2700*l.* on security of a proportion of the tolls under the acts, and of the toll-houses, following the form of the general act.

A question then arose on the meaning of the words in the latter act, "priority of charge," and on an ejectment brought by a mortgagee under the latter act, for recovery of possession of the toll-houses, it was contended that the entire legal estate was in the *first set* of mortgagees, and that the second had only an equity of redemption, and consequently could not

recover at law. But a majority of the Court of King's Bench, including the Lord Chief Justice, decided that the word *charge* related only to the application of the toll money, and not to the legal estate, which became vested in all the mortgagees, and consequently that one of the second set might, under the 49th section of the general act, recover possession of the toll-houses and gates, and receive the tolls, subject to an account with the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances.

CHAPTER XII.

OF MORTGAGES OF ADVOWSONS, CHURCH LIVINGS, RECTORIES IMPROPRIATE, AND TITHES.

An advowson is by no means an eligible subject for mortgage, for it produces no profit. It has been already mentioned (*a*) that on the living becoming vacant, the mortgagor has a right to nominate, and may compel the mortgagee to present his nominee although there be an express agreement between them to the contrary (*b*), and this doctrine applies whether the advowson be appendant or in gross (*c*).

As the mortgagee cannot present on an avoidance, it has been recommended that he should file his bill in equity for a sale (*d*). But even under the direction of a Court of Equity, a sale of an advowson cannot be made while vacant, so as to carry the next turn to present, contrary to the decided cases in matters of simony.

If the mortgagee presents, and his clerk is instituted, the mortgagor may file his bill to compel resignation, but the bill must be filed within six

(*a*) *Supra*, and the cases there cited.
(*b*) Mackenzie v. Robinson, 3 Atk. 558.
(*c*) Ibid. *supra*. (*d*) Ibid. *supra*.

months from the death of the last incumbent, or it will be dismissed (*e*). A mortgage of an advowson should always include a power of sale and be made in fee.

The 13th of Eliz. cap. 20, enacted, that no lease of any benefice with cure, should endure longer than while the lessor should be resident and serving the cure of such benefice, without absence above eighty days in any one year, &c. "and that all chargings of such benefice with cure thereafter, with any pension or with any profit out of the same, to be yielded and taken thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void.*" By the 3 Car. I., cap. 4, sec. 2, this Act was made perpetual.

In a case in the King's Bench (*f*), it appeared that an annuity had been granted out of a rectory, with a demise for a term of years to a trustee for securing it, and with a covenant and warrant of attorney to confess judgment as collateral securities. The judgment had been entered up, and a *fi. fa. de bonis ecclesiasticis,* and a *capias ad satisfaciendum,* obtained. On a rule to shew cause, why the grantor should not be discharged out of execution, and the deed and warrant of attorney and judgment vacated, and the *fi. fa.* set aside, it was argued for the grantee that

(*e*) Gardiner *v.* Griffith, 2 P. Wms. 404.

(*f*) Mouys *v.* Leake and another, 8 Term Rep. 411.

allowing the grant to be void within the statute, the covenant and warrant of attorney were good. On the other hand it was urged, that the grant was void by the common law, the canon law, and the statute law, and that if the grant was void, the covenant and warrant of attorney, being collateral securities for the same annuity, were void also. Lord Kenyon, in delivering the judgment of the Court, said, that he was not prepared to say, that the statute of the 13 Eliz. cap. 20, might not extend to that case, but he denied the consequence, that therefore the present rule must be made absolute; for even admitting that every thing that was done by the defendant to charge or affect the living was absolutely void, still the defendant's argument was not true in its extent: for if it were so, what was to become of all the process *de bonis ecclesiasticis?* The transaction was not *malum in se;* and a deed which was intended to operate one way, might operate another way, *ut res magis valeat quàm pereat,* if honesty required it; then why might not the deed have effect as a personal security against the grantor, containing as it did a covenant to pay the annuity? His lordship said, he would not, however, give any judicial opinion, whether or not the deed was void by the statute of Elizabeth, *which certainly contained some very strong expressions.*

It appears remarkable, that the objection taken to the annuity, in the case of Mouys *v.* Leake, viz. that the charge was *ipso facto* void under the statute, does not seem to have been urged in some preceding

cases relating to the same subject. Thus, in a case before Lord Mansfield (*g*), a creditor was in possession under a sequestration; an annuity creditor brought ejectment upon a prior demise of the rectory for securing the annuity; the judgment creditor pleaded, that the demise was avoided by eighty days' non-residence of the rector, and judgment was given accordingly; but it does not appear, that either the court or the bar considered the grant to be absolutely void *independently* of the non-residence; the like observation applies to a case in Ambler (*h*), in which a mortgagee of a rector's stipend, settled by Act of Parliament in lieu of tithes, and collected by an assessment on the inhabitants, and assigned by the rector to the mortgagee, was preferred to subsequent judgment creditors who had obtained sequestration.

By the 43 Geo. III. cap. 84, the 13 Eliz. cap. 20, and 3 Car. I. cap. 4, sec. 2, were wholly repealed. The 57 Geo. III. cap. 99, repealed the 43 Geo. III. cap. 84, and also repealed part of the 13 Eliz. cap. 20, but did not repeal in terms the clause relating to the charging of livings, and therefore it was suggested, in the former edition of this work, that if that clause was to be considered an independent clause, and operating in the mode contended for in Mouys *v.* Leake, a question might still arise, whether by the

(*g*) Doe *v.* Mears, Cowp. 129.

(*h*) Errington *v.* Howard, Amb. 485, *et vide* Doe *v.* Barber, 2 Term Rep. 749; Brown *v.* Rose, 6 Taunt. 123; Arbuckle *v.* Cowtan, 3 Bos. & Pull. 321.

repeal of the 43 Geo. III. cap. 84, and only a partial repeal of the 13 Eliz. cap. 20, not extending to the charging clause in that act, the prohibition against the encumbering of church livings had not revived, except by way of sequestration. And that to avoid the consequences of this construction, a charge upon a benefice should always be attended by a warrant of attorney to confess judgment and sequestrate the living.

The point of law before referred to has since repeatedly come before the Courts for consideration and decision, and several important cases have occurred upon it.

It is now decided that *a charge* on a church living, if made subsequently to the 57 Geo. III. cap. 99, is void (*i*); but not so if made in the intermediate period between the passing of the 43 Geo. III. cap. 84, and the 57 Geo. III. (*k*), although a term created in the living *prior* to the 57 Geo. III., be assigned *subsequently* to that statute, to secure a sum advanced to redeem the annuity (*l*), and if in a deed of charge made in the intermediate period, there is a covenant to charge any living subsequently acquired, and an exchange is made prior to the revival of the 13 Eliz., the charge on the newly-acquired living will be valid, although the new grant is dated subsequently to the

(*i*) Shaw *v.* Pritchard, 10 Barn. & Cress. 241.
(*k*) Doe *v.* Somerville, 6 Barn. & Cress. 126.
(*l*) Doe *v.* Gully, 9 Barn. & Cress. 344.

57 Geo. III. *n*. It is also decided that a charge on a church living which cannot since the 57 Geo. III. be created *per directum*, cannot be created *per indirectum*. And therefore that a warrant of attorney reciting the annuity deed and that the warrant is executed *to the intent* that a sequestration may be obtained by the annuitant *and continued during the continuance of the annuity for better securing the same*, is void, as showing an intent indirectly to create a charge on the living *n*. But if nothing appears on the instrument necessarily leading to the conclusion, that such was *the intent*, the warrant of attorney will be valid, although the *consequence may be*, that the profit of the living will probably be taken in execution. Thus, in a case *o* in which three annuities had been granted by a clergyman charged on his rectory, and secured by a demise of the rectory to a trustee, and by the covenants of the rector, and, as collateral securities, by three warrants of attorney, with defeazances in the common form to confess judgment at the suit of the plaintiff. Judgments were entered on the warrants of attorney, and sequestration obtained. An attempt was made to set aside the warrants of attorney, on the ground that they were a charge on the living; and it was urged

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(*m*) Metcalf *v.* The Archbishop of Canterbury, 6 Simons, 224.

(*n*) Flight *v.* Salter, 1 Barn. & Adol. 673; Newland *v.* Watkin, 9 Bingh. 113; Saltmarshe *v.* Hewett; and Skrine *v.* Hewett, 1 Adol. & Ell. 812.

(*o*) Gibbons *v.* Hooper, 2 Barn. & Adol. 734; *et vide* Newland *v.* Watkins, *supra*; Faircloth *v.* Gurney, 9 Bingh. 622.

that the case fell within *Flight* v. *Salter*, and that several instruments executed at the same time must be treated as one, and therefore whatever affected the validity of one, affected the validity of all. But it was observed by Lord Tenterden that one security might be good, and another bad. And Mr. Justice Parke asked, "supposing a bond had been given for payment of the annuity, would it have been a good plea to an action on such bond, that it was given to secure an annuity by means of a sequestration?" And the same judge afterwards remarked, that the deeds contained covenants for payment of the annuity, independent of the charge on the benefice. The Court then decided that the warrants of attorney were valid. On the same principle was decided a subsequent case (*p*), in which it appeared that a deed contained a grant of an annuity charged on a benefice, and secured by a demise to a trustee, with power to receive the tithes, &c., and the deed declared that a bond and warrant of attorney *already prepared*, and bearing even date therewith, and the judgment to be entered up thereon, should be further securities, and the creditors might forthwith after judgment sue out execution, and do all necessary acts for obtaining a sequestration, and as often as the annuity might be in arrear, the sequestration might be put in force. The bond recited the agreement for the annuity and the deed of grant, and was declared to be for securing the annuity; the warrant of attorney authorized judgment on a bond of even date,

(*p*) Colebrook *v.* Layton, 4 Barn. & Adol. 579.

and was defeazanced on payment of an annuity of the same amount, and payable on the same days as that mentioned in the bond. It was held, the reference to the bond was not sufficient to incorporate the terms of the annuity deed with the warrant, so as to make it a charge on the benefice, and therefore the warrant of attorney was valid, although an affidavit was made that it was given *with the intent* to charge the living.

In three cases the Courts have confined the sequestration to the arrears due, but have upheld the warrant of attorney and judgment. In the first of these cases(*q*), the warrant of attorney (which was to confess judgment for 3000*l.*) recited the grant of the annuity charged on the rectory, and declared the judgment to be in trust to secure the annuity, but no execution was to issue until the annuity was in arrear, and in case it should be in arrear for fourteen days after demand made, then execution might issue *for three thousand pounds* to be applied in payment of arrears and costs, and the surplus to be *invested in consols* upon trust to pay the annuity. The annuity being in arrears for fourteen days after demand, a sequestration issued, under which the tithes and property of the living were taken by the sequestrator to an amount greatly exceeding the arrears and costs. The arrears being fully satisfied, the Court ordered the execution to be

(*q*) Kirlew v. Butts, 2 Barn. & Adol. 736 (note).

set aside, but not the warrant of attorney or judgment. In this case, it will be observed, the warrant of attorney did not evince an intent to *charge the living* by way of sequestration, but that execution should issue generally when the annuity was in arrear, and therefore did not fall within Flight *v.* Salter.

In the other case (*r*), the warrant of attorney gave direct power to issue a sequestration, from time to time, as arrears fell due. The Court confined the sequestration to arrears due when it issued, but refused to set aside the warrant of attorney. The distinction between this case and Flight *v.* Salter is, that the latter authorized an immediate sequestration, which was to continue so long as the annuities continued, whilst in the former, the sequestration was only to secure arrears actually due, and was not to be a continuing charge.

In the remaining case (*s*) the warrant of attorney was in the common form to confess judgment for 3200*l.*, and in the annuity deed the grantor stipulated that if the annuity was in arrear, the grantee might levy the whole sum. The Court directed the writ of sequestration to continue in force only until the arrears were paid.

It has been decided that a judgment entered up

(*r*) Moore *v.* Ramsden, 3 Barn. & Adol. 917 (note).

(*s*) Britten *v.* Wait, 3 Barn. & Adol. 915.

on a warrant of attorney for securing an annuity charged on a living in the North Riding of Yorkshire (supposing the same to be in other respects maintainable) need not be registered under the 8th Geo. II. cap. 6, by reason that though it may be enforced by sequestration, yet the benefice is not affected by *the judgment;* and that if a judgment creditor under a sequestration receives more than the sum for which judgment was entered up, the Court will order satisfaction to be entered up on the judgment roll, as of the date on which a subsequent judgment was entered up, and will direct the sums received by the first judgment creditor since that time, to be handed over to the second judgment creditor, but not any of the sums received prior to the signing of the second judgment (*t*).

Rectories impropriate and tithes in lay hands are subject to the like mode of mortgage as any other species of real estate.

The law relating to rectories impropriate and tithes has lately received great emendations by acts of parliament passed for limiting the periods for making claim to such species of property; prior to such statutes, the rule prevailed, *nullum tempus occurrit ecclesiæ*, so that it was in all cases of claim to impropriate tithes necessary to shew by what means

(*t*) Cottle *v.* Warrington, 5 Barn. & Adol. 447.

the tithes came into lay hands; and in cases of claim of exemption from tithes, to shew the origin of such claim. It is sufficient in this treatise to refer to the statutes in question (*x*).

(*x*) See 2 & 3 Will. IV. c. 100, and 4 & 5 Will. IV. c. 83, as to modusses and compositions real; 3 & 4 Will. IV. c. 27, as to impropriate tithes.

CHAPTER XIII.

OF MORTGAGES OF THE EQUITY OF REDEMPTION.

THE nature of an equity of redemption, its rights and incidents have been already explained (*a*).

It has been shewn, that although at first it was contended that an equity of redemption was a mere *right*, yet that equity adhering to the principles of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence, and looking at the substance and not at the form of things, held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and consequently that the equity of redemption was *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption therefore, as already explained (*b*), being the ancient estate in the land, may be itself the subject of mortgage *toties quoties*, until equity debars the mortgagor of his equitable estate.

(*a*) *Vide* Book I. c. 4.
(*b*) *Supra*, 42.

As between mere equitable incumbrancers, it is a maxim in equity—*qui prior est tempore, potior est jure* (*c*). On this principle, each mortgagee of the equity of redemption has preference according to his priority in time (*d*).

But, as remarked by Mr. Fonblanque (*e*), this rule is applicable to *mere equities*, for there is another important principle that must be borne in mind, viz. that where equities are equal, the law must prevail (*f*), of which more will be hereafter said in its proper place in the chapter on the equitable doctrine of tacking. Equity, therefore, will not deprive a *bonâ fide* mortgagee of an advantage obtained by him *at law* by a conveyance of the legal estate, or an assignment of a prior judgment or statute (*g*), provided he did not obtain the conveyance of the legal estate after a decree to account, and provided at the time of advancing his money he had not notice of the mesne encumbrance, although he should afterwards obtain notice of the charge, prior to obtaining his legal protection (*h*). In the case, however, of a vendee advancing his money on a contract for sale, notice of a prior equitable charge before the conveyance will, it is said, bind him (*i*).

(c) *Supra.*
(d) Brace *v.* Duchess of Marlborough, 2 P. Wms. 491.
(e) *Vide* 1 Fonb. 320.
(f) Francis' 14th Maxim.
(g) *Vide* Brace *v.* Duchess of Marlborough, *supra.*
(h) See Wortley *v.* Birkhead, 2 Ves. 573.
(i) *Vide* Wigg *v.* Wigg, 1 Atk. 382, and 3 P. Wms. 306, note.

The consequence of the before-mentioned rule in equity, viz. that where equities are equal, the law must prevail, is, that a mortgagee of the equity of redemption may be postponed to a subsequent mortgagee, who having advanced his money without notice, afterwards (although then with notice) obtains possession of the legal estate. From this results a disadvantage and even danger in taking a mortgage of an equity of redemption, against which it is difficult to guard. An idea was indeed thrown out by Lord Eldon in Mackreth *v.* Symmons, which, if established as law, would afford great protection to the first equitable mortgagee, viz. that notice given to a first mortgagee shall affect the third mortgagee, who having advanced his money without notice of a second mortgage shall afterwards pay off the first mortgage. If this be law then a mortgagee of the equity of redemption may protect himself by express notice given to the first mortgagee, which notice will effectually prevent a third mortgagee from availing himself of a transfer made to him of the legal estate (*k*). It will be shewn in a subsequent chapter that notice to the trustees of an assignment of chattels personal will give priority and preference (*l*).

Another disadvantage attending a mortgage of an equity of redemption is, that the first mortgagee may, previously to the second mortgage, or even subsequently to it, if without notice, make further ad-

(*k*) *Vide infra*, chapter "NOTICE" *et quære.*
(*l*) *Vide infra.*

vances to the mortgagor, all of which (as also judgment or statute debts) (*m*), he will, as hereafter explained, be entitled to tack to his original mortgage in preference to the subsequent mortgagee. To guard against this mischief, it is incumbent on a person lending money on an equity of redemption first to make inquiry of the prior mortgagee into the amount of his demand, and secondly to give him express notice of the proposed mortgage. And it will be advisable, *if practicable, i. e.* if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor or the like, for otherwise the mortgagor might redeem the first mortgage and convey the legal estate to a stranger without notice, who would thus gain a preference to the prior equitable mortgagee.

Another disadvantage attending a mortgage of an equity of redemption is, that if the mortgagor shall afterwards redeem and take a conveyance to himself, he will, it may be thought, let in his widow's right to dower, and even his judgment and statute creditors, in preference to the equitable mortgagee (*n*).

A further disadvantage is, that the mortgagee has no legal remedy, so far as respects the estate, for enforcing payment of principal or interest, but is driven for relief to his suit in equity.

(*m*) Brace *v.* Duchess of Marlborough, *supra*.

(*n*) *Sed quære et vide supra.*

Another disadvantage, against which no prudence can guard, is, that the mortgagor may secretly have executed prior mortgages of the equity. For so gross a fraud the legislature has enacted his right of redemption shall be utterly lost. The 4 & 5 Will. III, cap. 16, after reciting that great frauds and deceits are too often practised by necessitous and evil disposed persons in borrowing money, and giving judgments, statutes, and recognizances privately, for securing the repayment of the said money, and the same persons do afterwards borrow money upon security of their lands of other persons, and do not acquaint the latter lender thereof with the same, whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognizances, before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once without giving notice of their first mortgage, whereby lenders of money upon second or after mortgages do often lose their money and are put to great charges in suit and otherwise, enacts, "That if any person shall borrow any money, or for any other valuable consideration for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered against him or them one or more judgment or judgments, statute or statutes, recognizance or recognizances to any person or persons, creditor or creditors, and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or for other valuable consideration, become indebted to such per-

son or persons, and for securing the repayment and discharge thereof shall mortgage his, her or their lands or tenements, or any part thereof, to the said second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons in trust for or to the use of such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, statute or statutes, recognizance or recognizances, in writing, under his, her, or their hand or hands, before the execution of the said mortgage or mortgages, unless such mortgagor or mortgagors, his, her, or their heirs, upon notice to him, her or them given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing under his, her, or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall, within six months, pay off and discharge the said judgment or judgments, statute or statutes, recognizance or recognizances, and all interest and charges due thereupon, and cause or procure the same to be vacated or discharged by record, that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof, but the said mortgagee and mortgagees, his, her, or their heirs,

executors, administrators, and assigns, shall and may hold and enjoy the said lands and tenements for such estate and term therein as were or was granted and settled to the said mortgagee or mortgagees against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by, or under him, her, or them, freed from equity of redemption, and as fully to all intents and purposes whatsoever as if the same had been purchased absolutely, and without any power or liberty of redemption:" And further, "that if any person shall mortgage any lands or tenements to any person or persons for security of money lent or otherwise accrued, or become due, or for other valuable considerations, and if the said mortgagor or mortgagors shall again mortgage *the same lands or tenements or any part thereof* to any other person or persons for valuable consideration (the said former mortgage being in force and not discharged), and shall not discover to the said second or other mortgagee or mortgagees or some or one of them the former mortgage or mortgages in writing under his, her, or their hands, that then and in those cases also, the said mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after mortgage or mortgages, but that such mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements for such estate and term therein as were or was granted and conveyed by the said mort-

gagor or mortgagors, against him, her, or them, his, her, or their heirs, executors, or administrators respectively, freed from equity of redemption, and as fully to all intents and purposes as if the same had been an absolute purchase, and without any power or liberty of redemption."

But it provides that, "if it shall so happen that there be more than one mortgage at the same time made by any person or persons to any person or persons *of the same lands and tenements*, the several late or under mortgagees his, her, or their heirs, executors, administrators or assigns shall have power to redeem any former mortgage or mortgages upon payment of the principal debt, interest and costs of suit to the prior mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns. And also, that nothing in the act contained shall be construed to bar any widow of any mortgagor of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such her dower or right.

It will be seen that the language of the statute is confined to a second mortgage *of the same lands*, and that the legislature does not appear to have contemplated that other estates might be also comprised in the second mortgage. To such cases, it has been held, the statute, being penal, does not apply (*o*), unless the

(*o*) Stafford v. Selby, 2 Vern. 589; Eq. Ca. Ab. 320, Pl. 5.

property joined with the equity of redemption is so inconsiderable that its introduction into the mortgage was palpably fraudulent, and for the mere purpose of affording a pretext for the evasion of the statute. The case of Stafford *v.* Selby also determined, that to comply with the directions of the statute the mortgagor must give the second mortgagee notice in writing under his hand of all the prior incumbrances; and that an assignee of the second mortgage, as well as a subsequent mortgagee redeeming the second mortgage, has the benefit of the statute. But that to entitle a second mortgagee to the advantage of the statute, he must come into court with clean hands and free from fraud.

The latter part of the statute, saving the rights of widows not concurring in the mortgage, will be inoperative in respect of women married subsequently to the 1st of January 1834, by reason that the 3 & 4 Will. IV. cap. 105, will render the dispositions by the husband binding on his wife without her concurrence.

The reader will, of course, not confound a legal reversion expectant on a mortgage term with an equity of redemption. It has been already explained (*p*), that the former is legal, and the latter equitable, assets. A mortgage in fee, therefore, after a mortgage for a term of years, will of course take precedence of mere equitable incumbrances. But

(*p*) *Supra*, 57.

even to a mortgage of such a nature, without some degree of precaution, a degree of hazard attaches, for the first mortgagee may continue to make advances to the mortgagor after the date of the mortgage in fee, either on his original security, or on judgment or statute security (*q*); all of which he will be entitled to tack, unless he had notice of the second mortgage; and even a subsequent mortgagee of the mere equity of redemption might obtain an advantage over the mortgagee of the legal reversion, by procuring an assignment of the first mortgage, to which he might tack his equitable charge if he had not notice of the intervening mortgage at the time of advancing his money. To guard against the first of these dangers, it is proper for the mortgagee of the legal reversion to make the like inquiries of the mortgagee of the term, and to give him the like notice as above mentioned in the case of a mortgage of the equity of redemption. And against the second danger, he would be in part likewise protected by the notice to the first mortgagee, if the principle suggested by Lord Eldon in Mackreth *v.* Symmons be law.

The Court cannot *compel* a second mortgagee who does not claim under a fiat in bankruptcy, but rests on his security, to concur in a sale obtained by a prior mortgagee under the general order of the 8th of March, 1794 (*r*).

If the Court decide in the first instance on the

(*q*) Brace *v.* the Duchess of Marlborough, *supra*.
(*r*) *Ex parte* Jackson, 5 Ves. 357.

validity of the claim of the mortgagee, the decision is conclusive on the commissioner in bankruptcy (*s*).

It is also here proper to remark that, although it has been decided (*t*) that an equitable mortgage is not within the general order of the 8th of March, 1794 (*u*), for sale of the mortgage premises on application by the mortgagee to the commissioners of bankrupt; yet it must be understood, that the decision in question does not apply to an actual mortgage either of a trust estate, or of an equity of redemption, but to that class of cases in which the mortgage arises from the inference of equity, such as an equitable mortgage by deposit of title deeds and the like; or in other words, that it does not apply to a mortgage of the equity, but to an equitable mortgage.

By the statute of the 1 & 2 Will. IV. cap. 56 (*x*), a Court of Bankruptcy was established, consisting of a chief judge and three puisne judges and six commissioners, to constitute a Court of Law and Equity, and to have (together with every judge and commissioner thereof) the rights and privileges of a Court of Record. And the judges, or any three of them, are constituted a Court of Review, to have superintendence and control in all matters of bankruptcy, with power to determine all such matters in bankruptcy as, by petition or otherwise, had there-

(*s*) *Ex parte* Jennings, 2 Swanst. 360.
(*t*) *Ex parte* Payler, 16 Ves. jun. 434.
(*u*) See Appendix, No. VI.
(*x*) Amended by 2 & 3 Will. IV. c. 114.

tofore been usually brought before the Lord Chancellor, whether such matters may have arisen in the Court of Bankruptcy or otherwise, except as therein afterwards provided; but subject to appeal to the Lord Chancellor on a special case to be approved and certified by one of the judges.

In lieu of a Commission of Bankruptcy, a fiat is directed to issue, and persons are to be appointed official assignees, one of whom is to be assignee of each bankrupt's estate, together with the assignee or assignees to be appointed by the creditors, and all the personal estate, and rents and proceeds of sale of real estate, are to be received by the official assignee, and by him transferred or paid into the Bank of England to the credit of the Accountant-General of the Court of Chancery, and until the assignees are chosen by the creditors, the official assignee is for all purposes to be sole assignee. But such official assignee is in no respect to interfere with the creditors' assignees in the appointment or removal of the solicitor, or in directing the time or manner of effecting any sales of the bankrupt's estate.

The act also provides, that instead of the old mode of assignment and bargain and sale, the personal estate of the bankrupt, and all such estate as by the 6 Geo. IV. c. 16, was directed to be conveyed by the commissioners to the assignees, (thereby excluding copyholds and the estates of tenants in tail,) shall vest in the assignees *virtute officii*, and that in register counties the certificate of the appointment of the assignees shall be registered, which

shall have the like effect as a registry of an actual conveyance would have had; but no purchaser, without notice of the bankruptcy, duly registering his deed, is to be affected by such bankruptcy, unless the certificate is registered, so far as regards the United Kingdom, within two months from the date of the appointment, and, as regards all other places, within twelve months from such date.

Various rules and regulations have been promulgated by this new Court. But no alteration appears to have been made in the general order of March, 1794, under which sales may be still made on application to the Commissioner.

If the mortgagee applies to the Court for leave to bid, the Court will direct the Commissioner to take the account and proceed to a sale in the manner directed by the general order, with leave for the mortgagee to bid, but the Court has decided that it is not *imperative* on a mortgagee (although it may be prudent) to apply for such leave (*y*). And if he bid without leave, and afterwards apply to the Court for an order of confirmation, the Court will, under special circumstances, grant an order *nunc pro tunc* (*z*). But, if a mortgagee applies for leave to bid, he must come before the Court in the character of a mere mortgagee, and waive any power of sale vested in him (*a*), and must, it seems, pay the costs of the

(*y*) *Ex parte* Ashley, 3 Dea. & Chit. 510; 1 Mont. & Ayr. 82.
(*z*) *Ex parte* Pedder, *ibid.* 622; 1 Mont. & Ayr. 327.
(*a*) *Ex parte* Davis, *ibid.* 504; 1 Mont. & Ayr. 89.

petition (*b*). If the same solicitor is concerned for the assignees and mortgagees, a separate solicitor should be appointed to conduct the sale (*c*). If the assignee himself become the purchaser, being also a mortgagee, the property will be ordered to be resold, subject to his claim as mortgagee (*d*). In questions respecting the existence of equitable mortgages, as by deposit of deeds and the like, the Court will not in future refer the question to the Commissioner, but will themselves decide the point (*e*).

A mortgagee becoming the purchaser will not be exempted from paying down the deposit (*f*).

The sale is exempt from the auction duty, whether made by direction of the assignees, with the concurrence of trustees appointed to sell the estates for the discharge of incumbrances, or with the consent of the mortgagees (*g*).

(*b*) *Ex parte* Williams, 1 Dea. & Chit. 489; 1 Mont. 514.
(*c*) *Ex parte* Rolfe, 1 Dea. & Chit. 77.
(*d*) *Ex parte* Turvill, 3 Dea. & Chit. 346.
(*e*) *Ex parte* Smith, 1 Dea. & Chit. 441.
(*f*) *Ex parte* Tatham, 1 Mont. & Ayr. 335.
(*g*) Attorney-General *v.* Winstanley, 5 Bligh, N. S. 130.

CHAPTER XIV.

OF EQUITABLE LIEN ON LANDED ESTATE.

If a vendor convey his estate to the vendee without receiving payment of any or having received part only of the purchase money, although the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed on the deed acknowledged to be received (*a*), in equity the vendee becomes a trustee for the vendor for the amount of the money unpaid (*b*), and the vendor has, *by an implied contract* between him and the vendee, *an equitable lien* on the estate for the amount of the money (*c*). In like manner, if a vendee advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the vendee has a lien on the land (*d*). And

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(*a*) See Mackreth *v.* Symmons, 15 Ves. jun. 337; Coppin *v.* Coppin, 2 P. Wms. 291; but the receipt is conclusive at law, unless merely fraudulent; Rowntree *v.* Jacob, 2 Taunt. 141; *et vide* Lampson *v.* Corke, 5 Barn. & Ald. 606; Winter *v.* Lord Anson, 1 Sim. & Stu. 444.

(*b*) Pollexfen *v.* Moore, 3 Atk. 272; Blackburn *v.* Gregson, 1 B. C. C. 424.

(*c*) Blackburn *v.* Gregson, 1 B. C. C. 420; Mackreth *v.* Symmons, 15 Ves. jun. 349; Cowell *v.* Simpson, 16 Ves. jun. 279; Smith *v.* Hibbard, 2 Dick. 740; Harrison *v.* Southcote, 2 Ves. 389; Chapman *v.* Tanner, 1 Vern. 267.

(*d*) See Burgess *v.* Wheate, 1 Black. 150; Lacon *v.* Mertins, 3 Atk. 4.

the lien will, in either case, bind the lands in the hands of the party himself and his heirs, and also of volunteers, and *bonâ fide* purchasers *with notice* claiming under him (*e*). But this implied contract may be rebutted by clear and irresistible evidence shewing the intention of the parties, that the estate shall not be a security for the money (*f*). The questions in the books relating to equitable liens on real estate have principally turned on this point.

In the older cases (*g*) it seems to have been considered that the taking of any security, although merely personal, such as a bond, promissory note, or the like, was proof of the intention of the parties, that the lien should not subsist, and even so late as in the case of Nairn *v.* Prowse (*h*), the Master of the Rolls considered the point as still open. The contrary however is now determined, and it is settled that a mere personal security, whether a bond (*i*), bill of exchange (*k*), promissory note (*l*), or the like,

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(*e*) Mackreth *v.* Symmons, 15 Ves. jun. 337; Walker *v.* Preswick, 2 Ves. 622; Elliot *v.* Edwards, 3 Bos. & Pull. 183; Gibbons *v.* Baddall, 2 Eq. Ca. 682.

(*f*) 15 Ves. jun. 341.

(*g*) Fawell *v.* Heelis, Amb. 724; 1 B. C. C. 422, note; 2 Dick. 425; Bond *v.* Kent, 2 Vern. 281; 1 Fonb. 153.

(*h*) 6 Ves. jun. 752.

(*i*) Hearn *v.* Botelers, Cary's Rep. Cha. 25; *et nota* Winter *v.* Lord Anson, 1 Sim. & Stu. 445, deciding contra, was reversed by the Lord Chancellor on appeal in Winter *v.* Anson, 3 Russ. 488.

(*k*) Hughes *v.* Kearney, 1 Sch. & Lef. 136; Grant *v.* Mills, 2 Ves. & Bea. 309; *Ex parte* Peate, 1 Madd. 346.

(*l*) Gibbons *v.* Baddall, *supra*.

without more (*m*), will not of itself be sufficient to remove the equitable lien; nor is there any distinction on the point between freeholds and copyholds, the equitable lien equally affecting each species of property (*n*).

The difficulty is in ascertaining what act is sufficient for such purpose short of an express agreement. Lord Eldon, in Mackreth *v.* Symmons (*o*), observed, "the more modern authorities upon this subject have brought it to this inconvenient state: that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." In Nairn *v.* Prowse (*p*) the vendee transferred long annuities, with an agreement that if the price did not rise within two years, so that the stock might be sold for 2200*l.*, the vendee would make good the deficiency. The stock sold for less than 2200*l.*; the vendor claimed a lien for the difference; but the Master of the Rolls thought this transaction a sufficient evidence of intention that the lien should not subsist. Of this decision, Lord Eldon, in Mackreth *v.* Symmons, hardly seemed to approve, considering that a vendor might be inclined to give a vendee a

(*m*) Mackreth *v.* Symmons, *supra.*
(*n*) Winter *v.* Lord Anson, 3 Russ. 492.
(*o*) 15 Ves. jun. 350.
(*p*) 6 Ves. jun. 752.

chance of the benefit of the rise without parting with the equitable lien (*q*).

A mortgage of other lands for the whole or part of the purchase money (*r*), or a mortgage of the purchased estate for part of the purchase money, permitting the rest to remain on personal security (*s*), has also been thought sufficient for the purpose of discharging the equitable lien on the purchased estate in the first instance wholly, and in the second instance to the amount of the money remaining on the personal security. But the former, Lord Eldon did not seem to hold quite conclusive (*t*), notwithstanding the opinion of the Master of the Rolls in Nairn *v.* Prowse, that it could be hardly thought it was intended the party should have a double mortgage. The latter may certainly be admitted to carry almost irresistible evidence of intention that the money on the personal security should not form a lien on the estate.

Sir Edward Sugden, in his Treatise on Vendors and Purchasers (*u*), appears still to think, that the doctrine of equitable lien extends to the case of an estate sold in consideration of an annuity secured by bond or covenant; and cites, as an authority, the case of Tardiff *v.* Scrughan (*x*), heard before Lord Camden, in which a father conveyed his estate to his two daughters as joint tenants in fee in consideration of

(*q*) 15 Ves. jun. 349.
(*s*) Bond *v.* Kent, 2 Vern. 281.
(*u*) Page 66, vol. ii. 9th edit.
(*r*) Nairn *v.* Prowse, *supra*.
(*t*) 6 Ves. jun. 341.
(*x*) 1 B. C. C. 423.

an annuity secured by their joint bond; one daughter conveyed her moiety to her husband for life, and it was decreed the husband should keep down a moiety of the annuity. But Lord Eldon, in Mackreth *v.* Symmons (*y*) disapproved the doctrine, and decided in opposition to it.

And in the more recent case of Clarke *v.* Royle (*z*), the Court expressed an opinion that Lord Eldon, in Mackreth *v.* Symmons, had expressly overruled the decision in Tardiff *v.* Scrughan. In Clarke *v.* Royle, however, the Court, instead of deciding the case in opposition to Tardiff *v.* Scrughan, endeavoured to distinguish the case before the Court from that of Tardiff *v.* Scrughan, on the ground that in the latter case simply a bond was given for the annuity, whilst in Clarke *v.* Royle, the deed of conveyance recited the agreement to convey on covenants being entered into by the purchaser for payment of an annuity, and a contingent sum of money, which covenants were, in the deed of conveyance, stated as forming such consideration, and were contained in the purchase deed. Under such circumstances, and considering the case of Winter *v.* Anson an authority, the Court decided the annuity and contingent sum were not charges on the estate. It will be remembered, that Winter *v.* Lord Anson was afterwards reversed, and therefore the case of Clarke *v.* Royle cannot be relied on as an authority.

A question is also raised by Sir Edward Sugden,

(*y*) 15 Ves. jun. 352. (*z*) 3 Sim. 502.

viz. whether the equity extends to affect third persons, as to give the vendor a preference to a subsequent equitable mortgagee with deposit of title deeds without notice (*a*). He considers the case of Stanhope *v.* Earl Verney (*b*) to be analogous, in which Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and, therefore, gave him an advantage over the first incumbrancer, which equity would not take from him. Upon the authority of this case, he seems to think an equitable mortgage, by deposit of title deeds, to a person *bonâ fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien on the estate for any part of the money.

Without entering into the question of the soundness of the doctrine in the case of Stanhope *v.* Earl Verney (*c*), it may be thought that the case of Mackreth *v.* Symmons did in effect determine, that an equitable mortgagee without notice had not such right to preference; for in that case, the plaintiff had been as *vendor*, the defendant was a subsequent *mortgagee*, to whom a conveyance had been made by the

(*a*) Page 76, vol. ii. 9th edit.
(*b*) Butler's Note, 1 Co. Litt. 290, b.
(*c*) Vide *Ex parte* Knott, 11 Ves. jun. 618.

assignees of the vendee, under a decree of the Court, without prejudice to the vendor's claims, of which, however, the defendant had not notice at the time of the contract for the mortgage: the defendant afterwards foreclosed, but without making the plaintiff a party to his bill. It proved that the legal estate was outstanding in a third person, so that all the incumbrances were equitable. Lord Eldon, after noticing that fact, observed, "then between equities the rule '*Qui prior est tempore potior est jure*' applies; and gave judgment for the plaintiff, thus making no difference between this and any other species of equitable mortgage. Sir Edward Sugden, in a note to his last edition, says, that Symmons had not the title deeds; that fact cannot, with certainty, be collected from the case; it was not urged in favour of the *vendor* that *he* had retained the deeds, which would have been a decisive fact in his favour; nor is it stated that the trustee, Coutts, (in whom the legal estate was vested,) had the title deeds. But if Symmons had not the title deeds, the case is certainly not an authority in direct opposition to the opinion expressed by Sir Edward Sugden.

Another matter of considerable importance (*d*) was alluded to in Mackreth *v.* Symmons, viz. whether the Court would, in the event of the death of the vendee, marshal the assets in favour of third persons, so as in case of necessity to throw the lien on the purchased estate. Sir Edward Sugden has

(*d*) Vide 1 P. Wms. 680, note.

given this matter his consideration (*f*), and seems to think that a third person could not require the purchased estate and the personal estate of the vendee to be marshalled.

The general rule of equity is, that, if a person has two funds to which he may resort, he shall not disappoint another person, who can only resort to one of the funds (*g*). If, therefore, Sir Edw. Sugden's conception was correct, the present would be *an exception* to this benevolent and wise rule of equity. The distinction, however, does not appear to be sound.

The principal authority for this exception to the general rule is, the language used by Lord Hardwicke in giving judgment in the case of Pollexfen *v.* Moore (*h*), viz. that this equity did not apply to third persons, and that if a vendor should exhaust the personal assets of the vendee, a legatee under the will of the vendee would not be entitled to stand in his place. The circumstances in this case were:—the vendee had died without paying all the purchase-money, and devised the estate to Kemp, whom he made executor, and also (subject to some legacies) residuary legatee. Kemp wasted the personal assets and died leaving Boyle Kemp his heir at law. The vendor filed his bill for payment of the residue of the purchase-money, and one of the legatees under the vendee's will filed a cross bill, praying that if the

(*f*) Page 67, vol. ii. 9th edit.—Vendors.
(*g*) Aldrich *v.* Cooper, 8 Ves. jun. 382.
(*h*) 3 Atk. 372.

purchase-money was paid out of the personal estate, she might stand in the vendor's place as to his lien on the land. Lord Hardwicke, after stating as before mentioned, that the equity did not apply to third persons, and that if the vendor should exhaust the personal assets of the vendee and of Kemp, the legatee would not be entitled to stand in his place and to come upon the purchased estate; added, but he also thought the heir should not avail himself of his father's injustice, and, therefore, he would direct the vendor to take his satisfaction out of the purchased estate.

The decree in Pollexfen *v.* Moore, is, however, considered to have been, and certainly was, at variance with the judgment; for it ordered that the purchase-money and interest should in the first place be paid out of the *personal* estate of the vendee, but if it should appear that the vendee did not leave assets sufficient to pay the residue of the purchase-money and all his other debts, legacies, and funeral expenses; or if the personal estate of the vendee was not sufficient by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, so far as the personal estate of the vendee should be applied in payment of the purchase-money, should be made good out of the purchased estate; and a competent part thereof was to be sold accordingly.

This decree certainly went to marshalling the assets, but it seems that the vendor had not parted

with the title deeds, which Sir Edward Sugden considers to have been the ground for the decree, on the principle that he had an equitable mortgage on the estate. With this explanation, Sir Edward Sugden thinks the case of Pollexfen *v.* Moore establishes an important distinction, viz. that where the vendor has an equitable mortgage on the estate, or in the case of fraud, the purchased estate and the personal estate will be marshalled in favour of simple contract creditors and legatees.

The case of Coppin *v.* Coppin (*i*), is also considered an authority in support of this doctrine. In that case, it appeared that a younger brother had purchased an estate of his elder brother, and died before payment of all the purchase money. By his will, he charged the estate with heavy legacies, but it was attested by two witnesses only; his brother was his heir at law, and also executor. Lord Chancellor King held, that the elder brother had an equitable lien on the estate, which he was entitled to discharge out of the personal assets, and that the legatees under the will could not stand in his place with respect to the equitable lien.

It may be remarked, that this case was attended by peculiar circumstances, for the elder brother had a double right to retain the remaining purchase-money out of the personal assets,—first, as vendor—and, secondly, as heir. It must, however, be admitted,

(*i*) Sel. Cha. Ca. 28; 2 P. Wms. 291.

that, in principle, it appears a considerable authority in favour of the exception contended for by Sir Edward Sugden in this instance to the general rule of marshalling.

Sir Edward Sugden also urges, that it seems to have been thought in Coppin *v.* Coppin, and apparently, he says, with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. And he argues thus: —" the general rule as to marshalling applies to cases, where the person resorting to the personal estate has an actual charge or lien on the real estate, but in this case, if equity first deems the purchaser a trustee for the vendor, as to so much of the estate as will satisfy the purchase-money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds." Now it is submitted in reply to this reasoning, that the inroad on the statute of frauds would not in fact be greater in the case here put, than in the case of an equitable lien by possession of title deeds, on which ground Sir Edward Sugden attempts to reconcile the judgment and decree in Pollexfen *v.* Moore. For, in fact, in the latter case the mortgage is raised on the presumption of equity, and then the legatee is let in to stand in the mortgagee's place. The cases are nearly parallel, or, at all events, are equally within the mischief intended to be prevented by the statute of frauds.

Notwithstanding the cases of Coppin *v.* Coppin

and Pollexfen *v.* Moore, we find the distinction in question by no means approved by two of the most able judges who have sat in equity. For Sir William Grant, when Master of the Rolls, declared he could not distinguish it from the common case of marshalling (*j*); and Lord Chancellor Eldon, in an earlier case (*k*), shewed the inclination of his opinion to be in favour of the legatee, and in a more recent case (*l*) he expressed that opinion in very clear and forcible language. He first remarked, "that the case of Coppin *v.* Coppin required a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to might be thought to have an immediate application; and the express terms of the decree in Pollexfen *v.* Moore might be found very inconsistent with it." He afterwards observed, "that if the meaning of Lord Hardwicke's remarks in Pollexfen *v.* Moore, viz. that the equity would not extend to a third person, was that he would follow the case of Coppin *v.* Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there was great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleased; having a lien upon the real estate, to exhaust the personal assets and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied; and

(*j*) Trimmer *v.* Baynes, 9 Ves. jun. 209.

(*k*) Austen *v.* Halsey, 6 Ves. jun. 475, *et vide* 2 P.Wms. 295, note.

(*l*) Mackreth *v.* Symmons, *supra*.

in that respect, with reference to the principle, the case was anomalous." It is now decided (*m*) that, so far at least as *creditors* are concerned, the general rule of equity will prevail, and the Court will marshal the assets, and it may be thought such will also be the decision in respect of pecuniary legatees, whenever the case shall call for a decision, and that this species of equitable mortgage will not be distinguished from the rest in so important a point as that which we have been discussing.

It must be recollected that this doctrine of equitable lien does not apply to personal estate, for as soon as the vendee has possession, actual or constructive, the lien is gone (*n*), and after the delivery of part, there can be no stoppage *in transitu* of the remainder (*o*); but of this more will be said hereafter.

(*m*) Selby *v.* Selby, 4 Russ. 341.

(*n*) See 15 Ves. jun. 344.

(*o*) *Ex parte* Gwynne, 12 Ves. jun. 383; Crawshay *v.* Eades, 1 Barn. & Cress. 181.

CHAPTER XV.

OF MORTGAGES OF CHATTELS PERSONAL.

It will be necessary to premise a few general observations on mortgages of chattels personal.

On the assignment of a chattel personal, whether the interest be present or future, vested or contingent, notice should be forthwith given to the trustees in whom it is vested, it being now decided that if a party takes an assignment of a chattel personal, and does not give notice of it to the trustees, a subsequent assignee, giving such notice, will gain preference (*a*). If a policy of life assurance is assigned, notice of such assignment must be given to the office in which the insurance is effected, to take it out of the reach of the bankrupt laws (*b*); but very slight notification is sufficient for the purpose (*c*). If a bond is the subject of assignment, not only should the instrument itself be given up to the assignee, but notice of such assignment should be given to the debtor to prevent his payment of the bond debt to the original obligee, which, in default of such notice, would be valid and discharge the security (*d*).

(*a*) Dearle *v.* Hall, Loveridge *v.* Cooper, 3 Rus. 1; Wright *v.* Lord Dorchester, 1 Russ. 9, n.

(*b*) Williams *v.* Thorpe, 2 Simons, 257.

(*c*) *Ex parte* Straight, 2 Dea. & Chit. 314, *et vide infra.*

(*d*) Ryall *v.* Rowles, 1 Ves. sen. 367; 2 Atk. 177.

The 13th of Eliz. cap. 5, has enacted that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment, and execution, at any time had or made *to or for any intent or purpose to delay, hinder, or defraud creditors or others* of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, or reliefs, shall be deemed and taken (only as against such person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devises and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect." And a penalty is inflicted of one year's value of the lands, and the whole value of the goods, on parties and privies to the transaction who shall defend the same, or alien or assign the lands or goods to him or them conveyed or assured, and imprisonment for one half year (*e*). But it is provided (*f*), that the act

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(*e*) 3d sec. *Nota.* Although in the latter part of this section, the word '*bond*' only is used, yet it must be taken to extend to foeffments, judgments, &c., as mentioned in the other parts of the clause, 4 East, 15.

(*f*) 6th sec.

shall not extend to any estate or interest in lands, goods, or chattels, had, made, conveyed, or assured, which estate or interest shall be *upon good consideration and bonâ fide* lawfully conveyed or assured to any person or persons, *not having at the time of such conveyance or assurance any manner of notice or knowledge* of such covin, fraud, or collusion as aforesaid.

On this statute, Lord Ellenborough has remarked(*g*), it is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, &c, that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however honest and good the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c. must be devised of malice, fraud, and the like, to bring it within the statute.

The retention of the possession by the debtor of chattels personal, after assignment, is however *primâ facie* proof of fraud. This was decided by Twyne's case (*h*), heard in the 44th year of the reign of Queen Elizabeth. The circumstances were: Pierce was indebted to Twyne in 400*l.*, and to C. in 200*l.* C. brought action of debt; and pending the action,

(*g*) Meux *qui tam* v. Howell, 4 East, 13.
(*h*) Twyne's case, 3 Rep. 480.

Pierce, who was possessed of goods and chattels of the value of 300*l.*, made a general assignment to Twyne, *but continued in possession*, and used them as his proper goods. C. obtained judgment, and had a *fi. fa.*; on which the sheriff proceeded to levy and was resisted by Twyne and others. And it was resolved that the gift had signs and marks of fraud, and that there was an implied trust between the parties, and that although there was a good consideration for the assignment, yet it was not *bonâ fide* within the meaning of the proviso, but the deed was fraudulent and void. Lord Coke, in his report of this case, adds, "And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also, let it be made in a public manner and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them, for continuance of the possession in the donor is a sign of trust, and that which is between the donor and donee, called a trust *per nomen speciosum*, is in truth as to all the creditors a fraud, for they are hereby defeated and defrauded of their true and just debts (*i*)."

But although possession of goods and chattels after sale or mortgage is *primâ facie* a mark of fraud, within the statute of the 13th Eliz. yet it is but

(*i*) *Et vide* Edwards *v.* Harben, 2 Term Rep. 587; Bamford *v.* Baron, *ibid.* note.

presumptive evidence, which may be rebutted by evidence written, or, as it seems, parol (*k*), on the part of the vendee or mortgagee shewing the possession was consistent with the nature of the transaction.

As, if actual delivery be from circumstances impossible, *lex neminem cogit ad impossibilia*, as in the case of an assignment of a ship at sea (*l*), or in a foreign port (*m*), or of goods at sea (*n*), or goods in transitu (*o*), when the delivery of the muniments of title, attended as to ships with such formalities as the statute law requires, will be sufficient, of which more hereafter; and also in the case of choses in action, as bond debts in which an assignment of the debt and delivery of the bond will be also sufficient (*p*).

Or, where actual delivery has been made as nearly as may be, such as where goods are bulky and are in a warehouse and the key of the warehouse is delivered (*q*).

Or, where delivery is refused notwithstanding the agreement to the contrary (*r*).

(*k*) Cole *v.* Davis, 1 L. Raym. 724; Meggott *v.* Mills, *ibid.* 286.

(*l*) Atkinson *v.* Mayling, 2 Term Rep. 462.

(*m*) *Ex parte* Batson, 3 B. C. 362.

(*n*) Brown *v.* Heathcote, 1 Atk. 160; *et vide* 1 Ves. 362.

(*o*) Flynn *v.* Mathews, 1 Atk. 185.

(*p*) 1 Ves. 367.

(*q*) West *v.* Skip, 1 Ves. 244; *ibid.* 362; Smith *v.* Smith, Stra. 955.

(*r*) 1 Ves. 244.

Or, where the possession is consistent with the deed of assignment (*s*), as in the case of goods *bonâ fide* settled on marriage, or in the cases presumed by Mr. Powell (*t*), *viz.* of an assignment to a creditor without his privity, or an assignment to secure a future contingent debt, or under apprehension of legal process; or where from the very nature of the transaction a delivery could not be contemplated, such as (*u*) where a supercargo of a ship bound to the East Indies, shipped goods, and made a bill of sale of them and of their profits to one Royston by way of mortgage. The voyage was made and the supercargo sold the goods, and bought others, and made several barters and exchanges. He afterwards died at sea, and in a question between the mortgagee and a judgment creditor, the Lord Chancellor held the assignment valid, for though sold to Royston they were entrusted to the supercargo to negotiate and sell them for Royston's advantage, and the possession was not for the purpose of giving a false credit.

Or, as in the case of land being mortgaged with a mill standing on it, not affixed to the freehold, in which instance the possession of the mill by the mortgagor, although a mere chattel, is held to be consistent with the deed (*x*).

(*s*) Cadogan *v.* Kennett, Cowp. 432; Haslington *v.* Gill, cited in 2 Term Rep. 597; *et vide* 3 Barn. & Ad. 502, note, and the cases there cited.

(*t*) Powell on Mortgage, 4th edit. 50, 51.

(*u*) Bucknell *v.* Roysson, Pre. Cha. 289.

(*x*) Steward *v.* Lombe, 1 Brod. & Bing. 506; Rufford *v.* Bishop, 5 Russell, 354.

And, it has been also held that if the assignment be on a *condition* to be performed by the vendee, the vendor's continuance in possession does not avoid it, because by the terms of the conveyance, the vendee is not to have possession until he has performed the condition (*y*).

The result of all the cases seems to be, that possession of goods and chattels after an assignment of them does not of itself constitute fraud as against creditors, but is only *primâ facie* evidence of it, capable, like any other evidence of a similar kind, of being rebutted or explained.

In the 21st year of King James the First (*z*), a further enactment was made for the benefit of creditors, which applied to cases of bankruptcy, but was much more powerful in its effects than the preceding statute of Elizabeth, inasmuch as the saving clause for the protection of sales and mortgages made for a valuable consideration, and *bonâ fide*, was not inserted. By that statute, after reciting that it often fell out that many persons before they became bankrupts, did convey their goods to other men upon good consideration, yet still kept the same, and were reputed the owners thereof, and disposed of the same as their own, it was enacted, that "if any person or persons

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(*y*) Edwards *v.* Harben, 2 Term Rep. 596; Martindale *v.* Booth, 3 Barn. & Ad. 498.

(*z*) 21 Jac. I. cap. 19, sections 10 and 11. *Et nota*, the recital to the eleventh section is, by the misprinting of the statute, added to the tenth section.

should become bankrupt, and at such time as they should so become bankrupt should, by the consent and permission of the *true owner and proprietary*, have in their *possession, order, or disposition*, any goods or chattels, *whereof they should be reputed owners*, and take upon them the sale, alteration, or disposition as owners, that in every such case the commissioners, or the greater part of them, should have power to sell and dispose the same to and for the benefit of the creditors which should seek relief by the said commission, as fully as any other part of the estate of the said bankrupt."

This statute is now repealed by an act passed in the 6th year of the reign of King George the Fourth(*a*), but as several important questions arose on the construction of the former act, the decisions on which will have a direct bearing on the construction to be put on the more recent enactment, it will be proper in this place to give them consideration; at the same time noticing the variations made by the 6 Geo. IV.

It was questioned whether the generality of the enacting clause of the 21st James, was not restrained by the recital to goods which were *originally* the bankrupt's (*b*). But it was determined unanimously by the judges of the King's Bench (*c*), that the statute extended to the goods of *third persons* in the trader's possession *to sell as his own*, but not to

(*a*) Cap. 16.

(*b*) *Vide* L'Apostre *v.* L'Plaisterer, cited 1 P. Wms. 318, *et vide* 3 P. Wms. 185; 1 Ves. 365, 371.

(*c*) Mace *v.* Cadell, Cowp. 232; *et vide* Copeman *v.* Gallant, 1 P. Wms. 314; Horn *v.* Baker, 9 East, 215.

goods confided to him as a mere factor or goldsmith. In the 6th George the recital is omitted.

Another question was, whether *conditional sales* were within the purview of the 21st James, the words of the statute being, if any person, &c. shall become bankrupt, and at such time as he shall so become bankrupt shall, by consent of the *true owner*, have possession, &c. It was contended a mortgagee was not the true owner; but it was adjudged that the words *true owner*, were put in contradiction to false or seeming owner, and therefore mortgages were within the act(*d*). In the 6 Geo. IV. the language is somewhat altered, but without affecting its original meaning, the words in the latter act being, "if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof, &c."

Another point debated on the former act was, whether the words *goods and chattels* in the act comprehended *choses in action;* and it was held they did(*e*). In the 6th Geo. IV. the words goods and chattels remain unaltered; and therefore, in order to divest from the mortgagor the ownership of outstanding debts, he must have done every thing that is equivalent to a delivery of chattels personal, *i. e.* of moveable goods, *viz.* assignment, delivery of the security,

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(*d*) Ryal *v.* Rowles, 1 Ves. 349; 1 Atk. 165.

(*e*) Ryal *v.* Rowles, *supra*; Jones *v.* Gibbons, 9 Ves. jun. 410; *Ex parte* Ruffin, 6 Ves. jun. 182; *et vide ex parte* Kensington, 2 V. & B. 79, which decided, that a trust estate *in stock* was not within the statute, and passed by mere assignment, not being capable of actual delivery.

and notice to the debtor (*f*), but debts due *on mortgage* are not within the statute, although collaterally secured by covenant or bond (*g*).

In the case of Ryal *v.* Rowles (*h*) it was held, that if a moiety of stock in trade be mortgaged by one partner to another, and they both continue the apparent owners, this is not a sufficient possession to give a specific lien against general creditors; and that if an undivided share of stock in trade be assigned to a stranger, it is necessary the mortgagee should be admitted into the business to render the security valid.

Where goods lying with a wharfinger in the name of A. had been purchased by B., who permitted them for several months after to remain at the wharfinger's in the name of A., during which time A. disposed of a part; but on notice of his insolvency, B. carried the order to the wharfinger for the delivery of the goods, and had the goods transferred into his own name nine days after A. had become bankrupt; it was held, there was a complete transfer before the bankruptcy (*i*).

(*f*) Jones *v.* Gibbons, *supra.* (*g*) *Ibid.*

(*h*) *Supra, sed nota,* that partners are seised *per my et per tout,* and each must be allowed against the other every thing he has advanced or brought in *as a partnership transaction,* and to charge the other in the amount with what that other has not brought in or has taken out more than he ought, and nothing is to be considered as his share but his proportion of the residue on the balance of accounts; West *v.* Skip, 1 Ves. 242.

(*i*) Jones *v.* Dwyer, 1 Rose, 339.

But where goods were taken in execution, and assigned by the sheriff and debtor to the creditor, who put his initials on every article and demised them to the debtor at a certain rent, who remained in possession to the time of his bankruptcy, it was held, the debtor was the *reputed owner*, there not being a notorious change of ownership (*k*).

The effect of these statutes is, that although a mortgage of chattels personal made *bonâ fide* and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors, under the 13 of Eliz. if it can be shewn the possession is consistent with the nature of the transaction, so that the presumption of fraud raised by the possession is rebutted; yet it may be void under the statutes of bankruptcy, as against the assignees of a bankrupt trader, who continues the *reputed owner* (*l*), unless it can be shewn that possession has been given as far as circumstances would permit, and therefore although in the before-mentioned cases of Cadogan *v.* Kennett and Bucknal *v.* Royston the assignments were valid within the 13 of Eliz., yet they would, it is conceived, have been void within

(*k*) Lingard *v.* Messiter, 1 Barn. & Cress. 308.

(*l*) As to what will amount to a reputed ownership, see the several cases of Walker *v.* Burnell, Dougl. 317; Bryson *v.* Wylie, cited 1 note, 1 Bos. & Pul. 83; Gordon *v.* The East India Company, 7 Term Rep. 228; Lingham *v.* Biggs, 1 Bos. & Pull. 82; Collins *v.* Forbes, 3 Term Rep. 316; Darby *v.* Smith, 8 Term Rep. 82; Horn *v.* Baker, *supra*; Steward *v.* Lombe, 1 Brod. & Bingh. 506; Storer *v.* Hunter, 3 B. & Cress. 368; Clark *v.* Crownshaw, 3 B. & Ad. 804; Rufford *v.* Bishop, 5 Russ. 346; and Amos on Fixtures, 193.

the bankrupt laws (*m*). But in the before-mentioned cases of the delivery of the key of the warehouse, the delivery of the muniments of ships or goods at sea, and of the bond on assignment of a bond debt, the assignments would have been valid under both statutes. The possession of goods by a *factor* is not within the bankrupt laws (*n*), nor is the possession by the debtor after assignment of chattels real (*o*), nor of articles of machinery if, by the custom of the country, they are let with the mill (*p*), nor of fixtures annexed to the freehold (*q*); but the possession after assignment of fixtures severed from the freehold is within the statute (*r*).

(*m*) *Vide* Pre. Cha. 288. (*n*) Ryal *v.* Rowles, *supra.*

(*o*) *Ibid. et vide* Co. Bank. Law, 6th edit, 359; Jones *v.* Gibbons, *supra;* Stephens *v.* Stephens, 1 Ves. 352; Bourn *v.* Dodson, 1 Atk. 154.

(*p*) Rufford *v.* Bishop, *supra.* To show more clearly than could be done by general words, the species of articles which were adjudged not to be within the order and disposition of the bankrupt, the following items were selected by the reporters as a specimen from the first part of the schedule:—iron chest in office; grates in mansion house; weighing machine and clock; floor-plates and boshes; grinding-stone with cast iron ring, shaft or axis, and wrought iron work in clay-mill; wood-turning lathe with cast iron wheels, shafts, carriages, head stocks, rests and popits; wrought-iron and steel spindles, &c.; cast iron spur wheels and bevel wheels; and cast and wrought iron shafts and spindles, and carriages with long trains of solid and pipe shafts communicating motion from the forge lathe wheels to the wood lathe; pair of large shears and bed in puddlers forge; hollow force to filtering forge enclosed in cast-iron plates in wheels; hoop-mill engine, thirty-nine-inch cylinders extra bed plate; street mill engine, thirty-eight-inch cylinder.

(*q*) Ryal *v.* Rowles, *supra; Ex parte* Quincy, 1 Atk. 474; Horn *v.* Baker, *supra.*

(*r*) Ryal *v.* Rowles, *supra;* Horn *v.* Baker, *supra.*

Much discussion has arisen on the subject of assignments by husband and wife of choses in action belonging to the wife. The law is at length settled that an assignment by the husband, or by him and his wife jointly, of choses in action of the latter in expectancy or contingency, will not be binding on the wife, in case the husband die in her life time and before the fund has fallen into possession (*s*); and in consistency with the decided cases, it has been held by the present Lord Chancellor, that husband and wife cannot effectually dispose of a life interest of the wife in a fund not settled to her separate use, beyond the duration of the coverture (*t*). And if the wife is entitled to stock in possession under a will, and the executors, by direction of the husband, transfer it to trustees to the separate use of the wife, and the husband afterwards becomes bankrupt, such transfer will not, in favour of the assignees, be held a reduction into possession by the husband (*u*).

This rule of equity does not, it should seem, apply to a chattel real (*x*), nor to a chose in action to which there is an immediate right, but in such latter case the wife has an equity to a settlement out of it.

Neither does it apply to a fund belonging to a married woman standing in the name of the accountant-

(*s*) Honner *v.* Morton, 3 Russ. 65; Hornsby v. Lee, 2 Madd. 16; Purdew *v.* Jackson, 1 Russ. 1.

(*t*) Stiffe *v.* Everitt, 1 Mylne & Craig, 37.

(*u*) Ryland *v.* Smith, *ibid.* 58.

(*x*) Purdew *v.* Jackson, *supra.*

general of the Court of Chancery, which may be pledged by the husband alone (*u*).

It was formerly held, that although a *factor* might make a *bonâ fide sale* of the goods entrusted to his charge, yet he could not *pledge* them; or at least if he did, the mortgagee would hold subject to the like claims as when the goods were in the factor's possession, although the mortgage was made without notice of the fact (*x*).

The law on this subject is now materially altered.

By the 4 Geo. IV. cap. 83, which recites that the law as it formerly stood relating to the deposit or pledge of goods afforded great facility to fraud, it was enacted (*y*), that it should be lawful for any person to take any goods, or bills of lading for the delivery thereof, in deposit or pledge from the consignee thereof, but such persons should acquire no further right, title, and interest than was possessed therein and might have been enforced by such consignee at the time of the pledge.

This statute was altered and amended by the 6 Geo. IV. cap. 94 (*z*), which extended the authority of the factor or consignee to pledge any goods of

(*u*) Sansum *v.* Driver, 3 Russ. 91.

(*x*) Paterson *v.* Tash, 2 Str. 1178; Daubigny *v.* Duval, 5 T. R. 604; Newsome *v.* Thornton and another, 6 East, 17; De Bouchout *v.* Goldsmid, 5 Ves. jun. 211.

(*y*) Section 2. (*z*) Sections 3 & 5.

which he had the bill of lading or warrant, or order for delivery, to any amount to any person *not having notice of his being a factor*; but with a proviso that such deposit, if made for an antecedent debt of the factor, should not extend beyond the amount of his interest in the goods, nor should any such deposit extend beyond such interest *if the party had notice.*

By the sixth section of the 6 Geo. IV. it is enacted, that nothing therein contained shall be deemed, construed or taken to deprive or prevent the true owner or owners, or proprietor or proprietors of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so sold, deposited or pledged, or *from the assignee or assignees of* such factor or factors, agent or agents, in the event of his, her, or their bankruptcy, nor to prevent such owner or owners, proprietor or proprietors from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents, nor to prevent such owner or owners, proprietor or proprietors from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares, or merchandize *so deposited or pledged*, upon repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods,

wares, or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents, and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any), as may have been advanced or given by such factor, or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments, nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her, or their hands, as the produce of the sale of such goods, wares or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments so advanced or given upon the security thereof as aforesaid, provided that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares, and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them to the estate of such bankrupt (*a*).

(*a*) As to mortgages of bills of lading, prior to the statute, see Evans *v.* Martlett, 1 Lord Raymond, 271; 3 Salk. 290; Lempriere *v.* Pasley, 2 T. R. 485; Wright *v.* Campbell, 4 Burr. 2047; Snee *v.* Prescott, 1 Atk. 245; Lickbarrow *v.* Mason and others, 2 T. R. 674; Savignac *v.* Cuff, *ibid.* 678.

CHAPTER XVI.

MORTGAGES OF SHIPS AND FREIGHT.

No species of mortgage security requires greater circumspection than that we are about to consider. In almost every other instance of the transfer of property, a defect in the assurance is remediable in equity, on proof of the equitable contract between the parties, as already noticed. But so strict are the provisions of the statute law regulating the change of this nature of property as almost to oust the jurisdiction of equity.

Recent statutes have made considerable alterations in this branch of the law; but to arrive at a clear understanding of the subject, it is necessary to advert, not only to the statutes now repealed, but also to the cases decided in reference to them.

The 7th & 8th William III., cap. 22 (*a*), enacted, that no ship or vessel should be deemed a British built vessel qualified to trade to or from *the plantations* until registered on the oath of one or more of the owners, before the collector or comptroller of the port to which the ship or vessel should belong; and

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(*a*) 7 and 8 Will. III. c. 22, is repealed by the 4 Geo. IV. c. 41, so far as relates to the registering of ships or vessels.

that in case there should be any alteration of property in the same port by the sale of one or more shares in any ship after registering thereof, such sale should always be acknowledged by indorsement on the certificate of the register.

This act it was considered did not preclude a mere parol agreement or contract for sale; and it applied only to ships trading to and from *the plantations.*

By the act of the 26 Geo. III. cap. 60 (*b*), the provisions of the 7th and 8th William III. cap. 22, were extended to *all* British built ships of fifteen tons or upwards; a form of certificate of registry was prescribed, which was to be delivered to the owner; and it was provided that no registry should be made except at the port to which the ship belonged. The 17th section enacted, "that so often as the property in any ship should be transferred in whole or in part, *the certificate of the registry of such ship or vessel should be truly and accurately recited in words at length, in the bill or other instrument of sale thereof* (*c*), and that otherwise such bill of sale should be utterly *null and void* to all intents and purposes."

A case (*d*) occurred soon after the passing of this

(*b*) 26 Geo. III. c. 60, is repealed by the 4 Geo. IV. cap. 41, so far as relates to the registering of ships or vessels.

(*c*) As to this, *vide infra*, p. 336.

(*d*) Rolleston and others, assignees of Margetson, a bankrupt, v. Hibbert and others, 3 Term Rep. 406.

statute in which it became necessary to consider the effect of its provisions, both at law and in equity. Margetson executed on the 21st June, 1788, a bill of sale of the ship Commerce, to Hibbert and others, and deposited with them the grand bill of sale, but the assignment did not contain a recital of the certificate. Hibbert and Co. gave Margetson an acknowledgment in writing, promising to return the grand bill of sale on payment of certain sums then due; the ship was at sea, and before her arrival in port Margetson became bankrupt; the assignees afterwards brought trover for the ship; it was contended by the defendants, that the transfer of ships at sea was not within the act, because it was necessary the certificate should be on board the ship, and therefore could not be recited, or that, at all events, the defendants had a lien on the ship for the money due. The Court held the case to be within the statute; for the parties might have extracted from the registry at the custom-house all that was necessary for the recital; and that it was a pledge and not a lien, and the bill of sale was absolutely void. On this (*e*) the defendants at law filed their bill in equity against the assignees for relief, on the ground that the bill of sale was a defective assurance, which ought to be made good by the assignees within the principle of the cases of Burgh *v.* Frances (*f*), and Taylor *v.* Wheeler (*g*). On the other hand it was contended, that the Court could not give relief against the act

(*e*) Hibbert and others *v.* Rolleston and others, 3 B. C. C. 571.
(*f*) *Supra.* (*g*) *Supra.*

of parliament, and that the case resembled the void grant of an annuity, for which it was never thought there was remedy in equity, although the grantee might recover back the consideration-money. Lord Chancellor Thurlow, after expressing great doubts, dismissed the bill without costs (*h*).

The same assignees (*i*) afterwards brought trover for the recovery of another ship assigned by Margetson, which ship was also at sea, but in this case, application had been made at the register-general's office in the custom-house for a copy of the certificate, which was recited in the bill of sale, but it turned out, there was a clerical error in the custom-house copy, and the signatures of the officers were not mentioned in the recital. The Court held that the clerical error did not vitiate the bargain and sale (*k*), and that mention of the signatures was not necessary.

A very strong case (*l*), was afterwards heard in the King's Bench in an action upon a policy of insurance on freight. The ship had been paid for by four partners, but was registered in the names of two only; the action was brought in the names of three; the declaration consisted of two counts: the first averred the interest to be in the three plaintiffs; the second averred the interest to be in them and the fourth

(*h*) On this point *vide infra*.

(*i*) Rolleston and others *v.* Smith, 4 Term Rep. 161.

(*k*) On this point *vide infra*.

(*l*) Camden *v.* Anderson, 5 T. R. 709.

partner. It was argued for the plaintiffs, that the two partners in whose name the register was made, might by parol agreement transfer their right to the other two in conjunction with themselves. Lord Kenyon intimated a strong opinion, that no title could be made to a ship, except by a bill of sale in writing pursuant to the act. The Court decided, that the right to the freight resulted from the ownership, and that the plaintiffs had neither legal nor equitable interest in the ship, and the plaintiffs were nonsuited (*m*).

Shortly after the determination of the case of Camden *v.* Anderson, and to remove the doubt, whether the interest in a ship could be transferred by parol, the act of the 34 Geo. III. cap. 68, now repealed (*n*), enacted, that no *transfer, contract or agreement* of property, in any ship or vessel, should be valid or effectual, for any purpose whatsoever, either at law or in equity, unless by bill of sale or instrument in writing, containing such recital as prescribed by the act; and it enacted, that the indorsement upon the certificate of register should be made in the manner and form therein mentioned, and signed by the party making the transfer, and a copy of it delivered to the person authorized to make registry, otherwise such *sale, or contract or agreement,* should be utterly null and void. The 16th sect. provided, that if any ship or vessel should be at sea, or absent from the port to which she belonged at the

(*m*) As to partners, owners of vessels, *vide infra.*

(*n*) 34 Geo. III. c. 68, sec. 14, is in part repealed by 4 Geo. IV. c. 41; *vide infra.*

time when such alteration in the property thereof should be made as aforesaid, so that an indorsement on the certificate could not be immediately made, the sale, or contract or agreement for the sale thereof, should, notwithstanding, be made by a bill of sale or other instrument in writing, as before directed, and a copy of such bill of sale or other instrument in writing should be delivered, and an entry thereof should be indorsed on the oath or affidavit, and a memorandum thereof should be made in the book of registers, and notice of the same should be given to the commissioners of the customs in the manner thereinbefore directed; and *within ten days* after such ship or vessel should return to the port to which she belonged, an indorsement should be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof should be delivered in manner thereinbefore mentioned, otherwise such bill of sale, or contract or agreement for sale thereof, should be utterly null and void to all intents and purposes whatsoever; and entry thereof should be indorsed and a memorandum thereof made in the manner thereinbefore directed. The 21st section provided for the granting of registers *de novo* on the alteration of property in the ship or vessel without change of port, at the request of the owners or proprietors (*o*).

On these statutes many important decisions occurred both at law and in equity, but principally turning on the assignment of vessels *while at sea*.

(*o*) Vide *infra*.

In the case of Moss *v.* Charnock (*p*), two-thirds of a vessel were in August, 1800, assigned by way of security. In November, the assignor became bankrupt. None of the requisites of the acts of the 26 and 34 Geo. III. were complied with until December following, when all was done which could be then performed. On the 7th March the ship came into port, and within ten days the remainder of the requisites of the acts were performed. The assignees of the bankrupt brought trover, and contended, that the bankruptcy having intervened between the time of the execution of the bill of sale and the compliance with the requisites of the acts, no property passed from the bankrupt prior to his bankruptcy; on the other hand, it was contended, that as the requisites of the statute of the 34 Geo. III. were complied with within a *reasonable* time after the assignment, that would by relation make the sale complete; the Court held that the public would be most effectually served by holding that no interest should pass from any owner of British ships to any other until the public had that information which was so essential to its commercial welfare, which would be best done by construing the statute as enacting, that no bill of sale or other such instrument should have *any operation or effect*, until the requisites imposed on the parties by the sale were complied with, and by not allowing any relation to hold good, so as to make the conveyance effectual from any antecedent time; and the Court was not

(*p*) Moss *v.* Charnock, 2 East, 399.

aware of any authority to shew, that if a statute directed a certain thing to be done without limiting a time for doing it, that such statute was to be construed as if it had said that it should be sufficient, if the thing was done within a *reasonable* time, instead of understanding the statute as enacting that the instrument should have no operation or effect, until what the statute required should have been complied with. Verdict was therefore given for the plaintiffs.

Lord Eldon justly remarked, that the generality of the reasoning in Moss *v.* Charnock, went to this extent, viz. that if a man sold a ship at sea, the vendee having done every thing required by the act that could be done, but afterwards before the arrival of the ship in port an act of bankruptcy was committed by the vendor, the assignees under the commission of the bankruptcy and not the vendee would take the ship. In this his lordship said he could not concur (*q*).

Baron Wood also in delivering his opinion in the Exchequer Chamber in the case of Hubbard *v.* Johnstone (*r*) expressed his disapprobation of the principle laid down in Moss *v.* Charnock, and said he thought the property passed instantly by the bill of sale, and that the subsequent acts to be done were not necessary to *transfer the property;* but the grant was

(*q*) Mestaer *v.* Gillespie, 11 Ves. jun. 637.
(*r*) 3 Taunt. 206.

defeasible by subsequent omissions, in cases where it was expressly provided but not otherwise; or, in other words, that the property vested in the vendee *instanter* on the execution of the bill of sale, supposing it to contain a proper recital of the certificate, subject to be divested on non-performance of the subsequent acts required by the statute (*s*).

In another case (*t*) the question arose on the effect of a writ of *fi. fa.* sued out by a creditor after the execution of the bill of sale and a memorandum of the transfer on the certificate of registry, but previously to a copy of the indorsement being delivered to the proper office, which however was done the next day. The Court held that the case of Moss *v.* Charnock was under the circumstances rightly decided, because there was gross delay, and the requisites of the statute were not complied with in a reasonable time, but they agreed in Baron Wood's construction of the statute, viz. that the bill of sale vested the property in the vendee, and that the requisites of the statute were in the nature of conditions subsequent, and as they were complied with as nearly *instanter* as could be and within a reasonable time, the writ of *fi. fa.* came too late (*u*).

Of this decision Lord Eldon expressed his approbation (*x*), and decided that the bankruptcy of the

(*s*) As to this point, *vide infra.*

(*t*) Palmer *v.* Moxon, 2 M. & S. 43.

(*u*) *Vide infra.*

(*x*) Dixon *v.* Ewart, 3 Mer. 332; *sed vide* Ritchie *v.* St. Barbe, Taunt. 768.

vendor did not vitiate the bill of sale, the indorsement being made on the certificate within ten days after the ship's return as required by the act, and that a power of attorney given by the vendee to make the indorsement was not revoked by the bankruptcy. On the same principle Sir Thomas Plomer, Vice-Chancellor, granted an injunction to prevent an improper indorsement being put on the certificate (*y*).

The doubts raised in the several cases before noticed have been now set at rest by the statutes we have next to consider. These are, the 4 Geo. IV. cap. 41, intituled, "An Act for the Registering of Vessels:" and the 6 Geo. IV. cap. 110, intituled, "An Act for the Registering of British Vessels."— These statutes enact, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his majesty's subjects shall, after registry thereof, be sold to any other or others of his majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, *or the principal contents thereof,* otherwise such transfer shall not be valid or effectual for any purpose whatever in law or in equity. The reader will observe that the words "or the principal contents thereof" are here introduced, which are not in the 26 Geo. III., and that the directions of the present acts are in other respects not so express as in

(*y*) Thompson *v.* Smith, 1 Madd. 395.

the former statute. But it is provided, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, if the identity of the ship or vessel be effectually proved thereby. This latter enactment appears intended to meet the objections raised in Rolleston *v.* Smith, before noticed.

It is then enacted, that the property in every ship or vessel of which there are more than one owner shall be taken and considered to be divided into *sixty-four* parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and that no person shall be entitled to be registered as an owner of any ship or vessel, in respect of any proportion of such ship or vessel which shall not be an integral sixty-fourth part or share of the same; and that upon the first registry of any ship or vessel, the owner or owners, who shall take and subscribe the oath required by the acts before registry be made, shall also declare upon oath the number of such parts or shares then held by each owner, and the same shall be so registered accordingly; but that if at any time it shall happen that the property of any owner or owners in any ship or vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall be lawful for the owner or owners of such fractional parts, as shall be over and above such number of integral sixty-fourth parts or shares, into which such property in any ship or vessel can be reduced by division, to transfer the same one to another, or jointly to any new owner, by memoran-

dum upon their respective bills of sale, without such transfer being made liable to any stamp duty; and also that the right of such owner or owners to such fractional parts shall not be affected by reason of the same not having been registered. The regulations here introduced by the statute are very clear and precise.

Provision is then made to meet the case of shares belonging to *a partnership or trading company*, by declaring that it shall be lawful for any number of such owners named and described in such registry, being partners in any house or copartnership, *actually carrying on trade in* any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, *in the name of such house or copartnership*, as joint owners thereof, without distinguishing the proportionate interest of each such owner, and that such ship or vessel, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and in equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever. The case of Camden *v.* Anderson, before noticed, probably suggested this provision.

The statute then declares, that no greater number than thirty-two persons shall be entitled to be the *legal owners* at one and the same time of any ship or vessel as tenants in common, or to be registered as such. But that nothing shall affect the *equitable* title of minors, heirs, legatees, creditors or others exceeding that number duly represented by or held

from any of the persons within the said number registered as legal owners of any share or shares of such ship or vessel. By this provision the number of owners on the register is restricted to one-half the number of aliquot parts into which the ownership is to be divided, but the equitable rights of other owners are not to be prejudiced.

An important provision is then made to meet the case of *joint stock companies*, by declaring that if it shall be proved to the satisfaction of the Commissioners of his Majesty's Customs, that any number of persons have associated themselves as a *joint stock company* for the purpose of owning any ship or vessel, or any number of ships or vessels, as the joint property of such company, and that such company have duly appointed or elected any number not less than three of the members of the same to be trustees of the property in such ship or vessel, or ships or vessels, so owned by such company, it shall be lawful for such trustees, or any three of them, with the permission of such commissioners, to take the oath required by the acts before registry be made, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel, or ships or vessels, shall in such manner belong.

In the 4 Geo. IV. (*a*) a proviso is inserted in respect of the registry of ships or vessels belonging to any corporate body, in which case the oath

(*a*) See sect. 31.

was to be taken before registry by the secretary or other proper officer of such corporate body, who should in such oath declare the name and description of such corporate body, instead of the names and descriptions of the owners of such ship or vessel. But in the 6 Geo. IV. (*b*) this proviso appears to be omitted.

These statutes then proceed to dispose of the doubt raised in the cases of Moss *v.* Charnock, Mestaer *v.* Gillespie, Hubbard *v.* Johnstone, Palmer *v.* Moxon, and Dixon *v.* Evans, before noticed, by enacting, that no bill of sale or other instrument in writing shall be valid and effectual *to pass the property* in any ship or vessel, or in any share thereof, or for any other purpose, *until* such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be, nor *until* such collector or comptroller respectively shall have entered in the book of registry, or in the book of intended registry, of such ship or vessel, as the case may be, (and which they are respectively thereby required to do upon the production of the bill of sale or other instrument for that purpose the name, residence, and description of the vendor *or mortgagor*, or of each vendor *or mortgagor* more than one, the number of shares transferred the name, residence, and description of the

(*b*) See sect. 33.

chaser *or mortgagee,* or of each purchaser *or mortgagee,* if more than one, and the date of the bill of sale or other instrument and of the production of it; and further, if such ship or vessel is not about to be registered *de novo,* the collector and comptroller of the port where such ship is registered shall and they are thereby required to *indorse* the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following, viz.

" Custom House, [*port and date, name, resi-*
" *dence, and description of vendor or mortgagor,*]
" has transferred by [bill of sale, *or other instru-*
" *ment*] dated [*date, number of shares*] to [*name,*
" *residence, and description of purchaser or mort-*
" *gagee.*]

" A. B. Collector.
" C. D. Comptroller."

And forthwith to give notice thereof to the Commissioners of Customs; and in case the collector and comptroller shall be desired so to do, and the bill of sale and other instrument shall be produced to them for that purpose, then the said collector and comptroller are thereby required to certify by indorsement on the said bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid.

And that *when* and so soon as the particulars of

any bill of sale, or other instrument, by which any ship or vessel, or any share or shares thereof, shall have been transferred, shall have been so entered in the book of registry as aforesaid, *the said bill of sale or other instrument shall be valid and effectual to pass the property* thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, *except* as against such subsequent purchasers and mortgagees who shall *first* procure the indorsement to be made upon the certificate of registry of such ship or vessel, in manner thereinafter mentioned.

And further that when and after the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book, of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale, or instrument purporting to be a transfer by the same vendor or mortgagor or vendors or mortgagors of the same ship or vessel, share or shares thereof, to any other person or persons, unless *thirty days* shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry, *or, in case the ship or vessel was absent* from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed *from the day on which the ship or vessel arrived at the port* to which the same belonged; and in case the

particulars of two or more such bills of sale, or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are thereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument, under which the person or persons claims or claim property, *who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid;* and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are thereby required to indorse upon the certificate of registry the particulars of the bill of sale or other instrument, to such person or persons

as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of the act that the several purchasers *and mortgagees* of such ship or vessel, share or shares thereof, when more than one appear to claim the said property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them, was entered in the book of registry as aforesaid, *but according to the time when the indorsement is made upon the certificate of registry as aforesaid.*

But that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee or his known agent, to the satisfaction of the Commissioners of his Majesty's Customs, it shall be lawful for the said commissioners to grant such *further* time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of the act; and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel or the share or shares thereof.

It will be observed that these provisions of the statute law are in some respects opposed to the opinions of the judges in the cases of Mestaer *v.* Gil-

lespie, Hubbard *v.* Johnstone, Palmer *v.* Moxon, and Dixon *v.* Evans, and in accordance with the decision in Moss *v.* Charnock, by enacting, that no interest shall be vested in the transferree *until* the bill of sale shall be entered on the register, which is to give the party preference against all persons excepting a subsequent purchaser or mortgagee who shall first procure an indorsement on the certificate; and for the protection of the first party, the statute gives him thirty days after his bill of sale has been entered, in case the ship is in port, or, if the vessel is at sea, thirty days after she arrives in port, to produce the ship's certificate for the purpose of indorsement, with a like saving in favour of each successive transferree, and f more than one transferree shall get on the register, then the priority is given to the party first producing the certificate for the purpose of indorsement.

Prior to the passing of the late statutes, it was considered safest to recite the certificate *in hæc verba*, for a material variation would totally vitiate the instrument (*c*). But this is no longer necessary if the principal contents are inserted.

An agreement for a sale must recite the certificate, or it will not be available in equity (*d*), or at law (*e*).

Neither the bill of sale nor an agreement for a sale need, however, recite the indorsements on the certificate (*f*).

(*c*) For an instance of this, see Westerdell *v.* Dale, 7 T. R. 306.

(*d*) Brewster and others *v.* Clarke and others, 2 Mer. 75.

(*e*) Biddell *v.* Leeder and Pulham, 1 Barn. & Cres. 327.

(*f*) Capadose *v.* Codnor, 1 Bos. & Pul. 483.

Although the bill of sale may be null and void as an instrument of assignment, yet it will not be nullified *to all intents;* and therefore a mortgagee may maintain an action of covenant against the mortgagor for the money lent under a covenant contained in the deed (*g*).

It was decided on the former acts that there could be no *equitable title* in a ship arising by implication of equity on acts between the parties, and that the register was conclusive evidence of the property even between joint and separate creditors, and that parol evidence was not admissible in equity to show the money was advanced out of the joint concern (*h*). But it will be seen that the recent statutes admit the introduction of trusts.

In case the assurance is defective, relief will not be had in equity on the contract as in the case of other defective assurances, but the transfer is *void* to all intents and purposes (*i*).

Whether equity will relieve in case of *fraud* on the part of the vendor preventing a compliance with the requisites of the statutes has been much doubted (*k*). In two cases (*l*), the Master of the Rolls refused to relieve on the ground of fraud, but, in another case,

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(*g*) Kerrison *v.* Cole, 8 East, 231.

(*h*) *Ex parte* Yallop, 15 Ves. jun. 60; *Ex parte* Houghton, 17 Ves. jun. 251; 1 Rose, 177; *et vide* Curtis *v.* Perry, 6 Ves. jun. 739.

(*i*) Spildt *v.* Lechmere, 13 Ves. jun. 589.

(*k*) Mestaer *v.* Gillespie, *supra.*

(*l*) See cases in note, 1 Madd. 400.

Lord Chancellor Eldon is said to have expressed a doubt (*m*).

A declaration of trust would not, even prior to the late statutes, have vitiated the legal effect of the bill of sale if the requisites of the statutes were complied with (*n*).

In the case of Thompson *v.* Smith (*o*), a doubt was started whether under the former statutes there could be a valid mortgage of a ship, or whether the right of redemption did not rest on honour between the parties, to obviate which the statutes now under consideration enact, that when any transfer of any ship or vessel, or any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner thereinbefore directed, state and express that such transfer was only made as a security for the payment of a debt or debts, or by way of mortgage or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as mortgagee or

(*m*) *Vide* 1 Madd. 406.
(*n*) Heath *v.* Hubbard, 4 East, 110.
(*o*) 1 Madd. 395.

mortgagees or as trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts, for securing the payment of which such transfer shall be made.

And that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they should so become bankrupt as aforesaid, shall have in his or their possession, order and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid, but that such mortgage or assignment shall

take place of, and be preferred to, any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

A doubt formerly existed, whether a mortgagee of a ship was not liable as legal owner, for goods furnished, although he had not taken possession, notwithstanding the decision in the case of Jackson *v.* Vernon(*p*) to the contrary. Any doubt, however, which may have existed on this point is now set at rest by the statute of the 6 Geo. IV. cap. 110 (*q*), that the mortgagee shall not be deemed owner by reason of the transfer to him by way of mortgage, nor the mortgagor, by reason of such transfer, be deemed to have ceased to be the owner, except so far as may be necessary for rendering the ship available by sale or otherwise for payment of the mortgage debt.

On the other hand, as the mortgagee is not to be considered as legal owner, except for the purpose of his security, he ought not to recover on a policy of insurance beyond the amount of the sum secured(*r*).

In a case(*s*) in which a purchaser of a ship, pre-

(*p*) 1 H. Blackstone, 117, note. (*q*) Sect. 45.

(*r*) Irving *v.* Richardson, 2 B. & Ad. 193.

(*s*) Young and another *v.* Brand and another, 8 East, 10.

vious to the completion of the conveyance, ordered the master to take the vessel to a shipwright to be repaired, it was held that the seller, although the legal owner, was not liable; and (*t*) where a ship was sold in the interval between an order for stores given by the seller, and their delivery on board, the purchaser was held not responsible. The principle deciding these cases is, that the credit was not given to the legal owner, but to a third person. It may be also proper to add in this place, that *the register alone* is not even *primâ facie* evidence to charge a person as owner of a ship, in a suit between private individuals (*u*), nor is the bill of sale, unless it appears to have been accepted by the assignee (*x*).

The freight, if in a charter-party, may, it seems, be assigned independently of the ship, and will not be within the registry acts; and equity will grant an injunction to prevent payment to the mortgagor (*y*).

But otherwise the earnings cannot, it seems, be separated from the ship itself (*z*). And, although the 6 Geo. IV. cap. 110, has declared that a mortgagee shall not be deemed owner, except for the

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(*t*) Trewbella *v.* Rowe, 11 East, 435.

(*u*) Frazer *v.* Hopkins and another, 2 Taunt. 5.

(*x*) Tinkler *v.* Walpole, 14 East, 226; *et vide* Cooper *v.* South, 4 Taunt. 802; Price *v.* Anderson, ibid. 652.

(*y*) Mestaer *v.* Gillespie, *supra.*

(*z*) Spildt *v.* Lechmere, *supra.* Abbott on Shipping, 31.

pose of making a transfer, yet the freight will s to him by the mortgage on his reducing the ship) possession (*a*).

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a) Dean *v.* M'Ghie, 4 Bingham, 47. But see Chinnery *v.* kburne, 1 H. Blackstone, 117, note, where the mortgagee has taken possession.

CHAPTER XVII.

MORTGAGES OF STOCK.

Sir William Grant, when Master of the Rolls, justly remarked, that public stocks or funds are, in fact, *perpetual annuities* granted for ever redeemable by the public. They are a mere right; and the circumstance that government is the debtor makes no difference. They constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coin-money capable of possession and manual apprehension. He there determined, that if stock be transferred into the name of a married woman, and her husband die in her lifetime, without having accepted the stock in the Bank books, or otherwise reduced it into possession, the stock will survive to the wife, although the husband and wife should in his lifetime have signed partial transfers of the stock (*a*).

In another case (*b*), the Master of the Rolls remarked, there was a very untechnical expression used with regard to stock; there is literally no such thing as one hundred pounds stock: knowing, however, that in common parlance, people, speaking of

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(*a*) Wildman *v.* Wildman, 9 Ves. jun. 174.
(*b*) Kirby *v.* Potter, 4 Ves. jun. 751.

stock, will so express themselves, the Court will apply it.

Public stock may become the *subject of loan*, or it may be itself *the security* for the repayment of money.

It was formerly doubted whether a loan of stock was lawful, or whether it was not prohibited by the 7 Geo. II. cap. 8, s. 8, which enacts that "all contracts and agreements whatsoever, which shall from and after the first day of June, 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever contracting or agreeing, or on whose behalf, and with whose consent any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not at the time of making such contract or agreement be actually possessed of or entitled in his, her, or their own name or names, or in the name or names of a trustee or

trustees, to their use or their own right as aforesaid, shall forfeit and pay the sum of 500*l.*, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them, who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made is or are not possessed of or entitled unto the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use, or right, shall for every such offence forfeit and pay the sum of 100*l.*, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance, shall be allowed, one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her or them who shall sue for the same."

The question was tried in an action of assumpsit, before Lord Kenyon (*c*), when a verdict was found

(*c*) Sanders *v.* Kentish and Hawkesley, 8 T. R. 162.

for the plaintiff, subject to the opinion of the Court of King's Bench. The circumstances were, the plaintiff, Saunders, who was a clergyman, lent the defendant, Kentish, who was a stockjobber, 3000*l.* 4 *per cent.* annuities; the defendant, Hawkesley, was a surety with Kentish for the re-transfer. The defence set up to the action by the defendants was, that the loan was within the prohibition of the 7 Geo. II. cap. 8. It was answered, that the transaction was within the saving of the 11th section, namely, "that nothing in this act contained shall extend or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money, or any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made and entered into for the redelivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." In this opinion the Court coincided. Lord Kenyon remarked, the act is intituled, "An Act to prevent the infamous Practice of Stockjobbing." But if the defendants' objections are to prevail, the title of the act ought to be altered, and it should run thus: "An Act to encourage the wickedness of stockjobbers, and to give

them the exclusive privilege of cheating the rest of mankind."

A loan of stock is therefore lawful; and the parties may agree that a sum of money equal to the dividends shall be paid in the mean time, although the dividends shall exceed five *per cent.* on the money produced by the sale of the stock; for the lender takes the hazard of the rise and fall of the market price; and if an action is brought at law on a bond given as a security for the re-transfer of stock in estimating the measure of damages, the lender will be entitled to recover the highest value of the stock on the day of trial (*d*); and if a bonus has been declared on the stock, the lender will have a right in equity to insist on the replacement of the original stock increased by the amount of bonus (*e*).

It is not material whether the stock is actually transferred to the mortgagor, or whether the stock is sold out, and the net produce paid to him (*f*).

And if a person is indebted to another man in a sum of money, an agreement between them that the debtor shall transfer to the creditor within a given time such a quantity of stock as the amount of the debt would have purchased on the day of the agreement, and pay dividends in the meantime, is lawful (*g*).

(*d*) Shepherd *v.* Johnson, 2 East, 211.

(*e*) Vaughan *v.* Wood, 1 Mylne & Keen, 403.

(*f*) Tate *v.* Wellings, 3 T. R. 537.

(*g*) Maddock *v.* Rumball and another, 8 East, 304.

The chief question in matters of this sort is, whether the transaction is usurious? and the general principle to be deduced from the cases seems to be, that if the principal money lent is not put in hazard, and the creditor may obtain an advantage exceeding legal interest, the loan will be tainted with usury; but some of the adjudged cases are not easily reconcileable to this principle.

In Barnard *v.* Young (*h*), heard before Sir William Grant, when Master of the Rolls, it appeared that 10,000*l.* had become due on bond, and the agreement was to transfer to the creditor, on a given day, so much stock as upon the 12th day of February then last, on which day the 10,000*l.* secured by bond became due, could have been purchased with the 10,000*l.*; OR, to pay the said 10,000*l.* *at the option of the creditor*, and also in the mean time to pay interest at five *per cent.* on the 10,000*l.* The Master of the Rolls said, this was in fact an usurious contract; for the principal money was never at hazard, the creditor was at all events sure of having that with lawful interest, and had the chance of an advantage if the stock rose. It was usurious to stipulate for that chance.

The Master of the Rolls in Barnard *v.* Young, distinguished that case from the case of Forrest *v.* Elwes (*i*), which had been heard before Lord Alvanley, and the ground of distinction taken by the Master of the Rolls was, that in Forrest *v.* Elwes there

(*h*) Barnard *v.* Young, 17 Ves. jun. 44.
(*i*) Forrest *v.* Elwes, 4 Ves. jun. 492.

was no option. In that case it appeared, that Mr. Elwes had in the year 1766 lent Commodore Forrest 8000*l.* Old South Sea Annuities, valued on the day of transfer at 7170*l.* The condition of the bond was, that Forrest should, at the end of six months, retransfer the 8000*l.* stock, and pay interest *at five per cent. on the* 7170*l.* Breach was made by Forrest in the condition of the bond by non-transfer of the stock within the six months, and a long period elapsed, during which part of the principal was discharged, but a great arrear of interest accrued on the residue. After the death of Forrest a suit was instituted in equity by his executors, in which Elwes was a defendant, and it was directed that the balance due to Elwes should be paid, and that the master should take an account of the money due. In the year 1798 the master reported that 6500*l.* was due for principal, with a very large sum for interest. It was objected on the part of the executors, that the master ought to have reported that so much was due as would purchase 8000*l.* South Sea Annuities, when the same might be purchased at some given period of time, after deducting the several sums already paid on the bond. On the other hand it was contended, that Mr. Elwes was entitled to the residue of the 7170*l.* The Master of the Rolls said, the question was, what was the fair measure of the damage? and asked, whether he should do justice in giving the same annuities, which were formerly worth eighty-nine *per cent.* and were then much depreciated? and he overruled the exception. Now it is with much deference suggested, that the effect of this decision was, after the expiration of the six months, to remove

from Mr. Elwes the hazard alluded to in Barnard *v.* Young, and to give him the same chance of rise without the risk of fall which vitiated the transaction in that case; unless it be supposed that if after the expiration of the six months, the stock had risen in value, Mr. Elwes would not have been entitled to the advantage of the rise, but have been kept to the 7170*l.*, which it seems difficult to conceive, for under such a determination Mr. Elwes would have sustained an actual loss through the default of the borrower.

There is also a case (*k*) heard in the King's Bench, which appears at variance with the principle before stated. The circumstances were; that the defendant Wellings applied to the plaintiff's testator to advance him a sum of money, which was agreed to, but the testator said he should expect the same interest which he received in the short annuities, namely, eight and a half *per cent.* To this the defendant assented. The money was accordingly raised by the testator by sale of short annuities, and the agreement was, that the defendant should replace the stock by the 1st day of September, 1785; but if it was not replaced by that time, then he should *repay the money raised* on the 1st of January, 1786; and in the mean time should pay *such interest as the stock would have produced.* On the trial Lord Kenyon left it to the jury to say, whether this was intended as a *bonâ fide* loan of stock to be replaced at a subse-

(*k*) Tate *v.* Wellings, 3 Term Rep. 537.

quent time, or repaid in money; or whether it was intended to be a loan of money, and the present device a mere colour for usury; the jury found it a mere loan of stock, and gave the plaintiff a verdict. A rule was afterwards obtained to shew cause why the verdict should not be set aside, and a new trial granted on the ground of usury, and it was argued that a contract for a loan of stock to be replaced on a given day, or to be repaid in money, reserving a greater interest than the law allows, in other cases was clearly usurious. The Court considered that they were precluded by the verdict of the jury from considering whether the transaction was a mere cloak for usury. Lord Kenyon thought that as the transaction was legal during the first year, there was nothing superadded to make it usurious. Mr. Justice Ashhurst thought, that from the contract the creditor derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced; and Mr. Justice Buller said this was not like the case cited from Cro. James (*l*), where the principal was always secure, for here the testator might have been a loser in the event of the stock rising after the first year. A new trial was therefore refused.

On consideration of the foregoing case, it is submitted, that the opinion given by Lord Kenyon, viz. that there was nothing superadded after the first year to make the transaction usurious,

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(*a*) Roberts v. Tremayne, Cro. Jac. 507.

appears singular, considering that it was an agreement to repay *a sum of money* with eight and a half *per cent.* interest. The reason given by Mr. Justice Ashhurst is yet more remarkable, for it would seem to imply that an agreement to repay money raised by the sale of stock would not be usurious, if the rate of interest did not exceed the dividends of the stocks sold. The reasoning of Mr. Justice Buller, namely, that the lender ran the hazard that the stock might rise after the year, would apparently apply to any loan of money raised by the sale of stock.

During the late war when the price of stock was so low as to render more than 5*l. per cent.* interest, mortgages of stock were frequent, and almost superseded money mortgages; they have now nearly disappeared. The most prudent course in such species of mortgage is, to make the land redeemable on the replacing of the stock on a given day, and payment of dividends in the mean time. The cases, however, seem to imply that it will not be unlawful to stipulate for the re-transfer of the stock, and to reserve five *per cent.* on the amount of the money produced by the sale, instead of the dividends, but the lender cannot be advised to rely on the case of Tate *v.* Wellings, as an authority for the proposition, that he may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for the payment of the amount of the money produced by the sale, and reserve a rate of interest equal to the dividends. The case of Forrest *v.* Elwes may be considered as decided on the par-

ticular circumstances of hardship attending the case, and not as an authority for a general rule, that under a similar proviso, the Court of Chancery would decree a redemption on payment of the money instead of the transfer of stock, in order to save the lender from a loss; and it may be concluded from the case of Barnard *v.* Young, that the lender must not reserve to himself an option to require the transfer of stock, or payment of the money (*a*).

If stock is itself made the security for money and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without filing his bill of foreclosure (*b*). But the mortgagee will be decreed to account for the surplus (*c*).

(*a*) For a precedent of a mortgage of stock, see App.

(*b*) Tucker *v.* Wilson, 1 P. Wms. 261; Lockwood and others *v.* Ewar, 2 Atk. 303.

(*c*) Harrison *v.* Hart, Comyns, 393. *Nota.* The circumstances of this case form a striking proof of the extent of the South Sea bubble, for it appears that 20,000*l.* South Sea stock was transferred as a security for 70,000*l.* money and interest, and that the 20,000*l* South Sea stock actually produced the sum of 86,291*l.* 17*s.* 8$\frac{3}{4}$*d.* By the deposition of one witness, Hart agreed to sell him 1000*l.* South Sea stock at 1000*l. per cent.* premium.

CHAPTER XVIII.

Of Liens in general.

It is perhaps hardly within the scope of the present Treatise to enter into a consideration of the general doctrine of lien; of that particular branch which is confined to equity, and relates to real estate, mention has been already made (*a*). A few observations on the subject may, however, be not considered in this place irrelevant.

Lien may subsist both at law and in equity, although there are some liens which subsist in equity only (*b*).

Liens are general or specific. By the common law, every one has a lien on a specific article delivered to him to work on for the amount of the labour done; and this has even been extended to give a certificated conveyancer or special pleader a lien on the papers in his hands, so far as respects his costs on that particular account (*c*). But this species of lien does not extend to general balances or money due on former or different accounts (*d*).

The cases turn principally on the point, whether

(*a*) *Vide* Chap. XIII. Book II.
(*b*) 2 Mer. 403.
(*c*) Hollis *v.* Claridge, 4 Taunt. 807.
(*d*) *Ex parte* Ockenden, 1 Atk. 235.

the lien is confined to the particular transaction, or is extended to the general balance?

Lord Mansfield has stated (*e*), that the convenience of commerce and natural justice are on the side of liens, and that therefore, of late years, Courts have leant that way:—first, where it is *an express contract;* secondly, where it is implied from the usage of trade; or, thirdly, from the manner of dealing between the parties on the particular case; or, fourthly, where the party has acted as factor. It may not be improper briefly to consider the doctrine under these several divisions:—

First: In the case of an express contract. The Court of King's Bench has decided, that an agreement amongst a number of dyers, bleachers, &c. entered into at a general meeting, that they would not receive any goods without having a lien on the goods in hand for a general balance, was good in law; and that every person afterwards sending goods to such persons with notice of that agreement, must be considered as assenting to it and bound by it (*f*).

Secondly: In the case of implication from the usage of trade. On this principle it was decided, that a packer had a lien for his general balance, even including loans of money (*g*). It is also held that

(*e*) 4 Burr. 2221.

(*f*) Kirkman *v.* Shawcross, 6 Term Rep. 14.

(*g*) *Ex parte* Deeze, 1 Atk. 228.

bankers (*h*), and policy brokers (*i*), have a general lien for the balance of their accounts. But dyers (*k*), and common carriers (*l*), it seems, have not a lien by general usage.

Thirdly: From the manner of dealing between the parties, as in the case of Downman *v.* Matthews (*m*), which was a transaction between a clothier and a dyer, and there being evidence that they always made up their accounts by giving mutual credit, the lien for the general balance was allowed.

Fourthly: As to factors. In the case of Kruger *v.* Wilcox (*n*), Lord Hardwicke took the opinion of four merchants, who agreed, that if there is a course of dealings and general account between the merchant and the factor, and a balance is due to the factor, he may retain the ship and goods or produce for such balance of the general account, as well as for the charges, customs, &c. paid on the account of the particular cargo; but that if the factor deliver up the goods to the merchant, by his parting with the possession he parts with the specific lien; and the Court decreed accordingly.

(*h*) Davis *v.* Bowsher, 5 Term Rep. 488.

(*i*) Cooke's Bankrupt Laws, 442.

(*k*) *Vide* Green *v.* Farmer, 4 Burr. 2214; Close *v.* Waterhouse, 6 East, 525.

(*l*) Rushforth *v.* Hadfield, 6 East, 518.

(*m*) Prec. in Cha. 580; *et vide* Rushforth *v.* Hadfield, *supra*.

(*n*) Kruger *v.* Wilcox, Amb. 254.

It is now also decided, that a solicitor has a general lien for his costs, &c. on the papers in his hands (*o*). If a mortgagee deposits the title deeds with his solicitor, the latter has a lien on them to the amount of the mortgage debt for his bill of costs, even against a purchaser from the mortgagor, who ought to have inquired at the time of his purchase in whose hands the deeds were (*p*). But if on an intended mortgage the deeds are delivered by the proposed mortgagee to his solicitors, and the mortgage goes off, the solicitors will not have a lien for their bill of costs (*q*). It seems a solicitor may obtain an order to prevent his client from receiving money recovered in a suit, in which he has been employed for him, until his bill be paid (*r*). But if his client substitutes another solicitor, he cannot prevent the cause coming to a hearing, subject to his lien (*s*), nor can he prevent his client discontinuing the action, subject to the costs incurred (*t*).

Sir William Grant observed, that as to liens of one man on goods in the possession of another, he knew of no difference between the rules of decision in courts of law and in courts of equity (*u*).

To create the lien, the goods must come into the

(*o*) Stevenson *v.* Blakelock, 1 M. & S. 535.
(*p*) Ogle *v.* Story, 4 Barn. & Adol. 735; 1 Nev. & M. 474.
(*q*) Pratt *v.* Vizard, 2 Nev. & M. 455.
(*r*) *Vide* Dougl. 101.
(*s*) O'Dea *v.* O'Dea, 1 Sch. & Lefroy, 315.
(*t*) Merrywether *v.* Mellish, 13 Ves. jun. 162.
(*u*) Gladstone *v.* Birley, 2 Mer. 403.

actual possession of the party claiming it, on which principle it was held (*x*), that if a factor, in consideration of goods being consigned to him, accept bills drawn on him by the consignor, and pay part of the freight before the goods arrive, and afterwards become insolvent before the bills are due, the consignor may stop the goods *in transitu*.

It appears from the cases to be decided, that the right of lien does not extend beyond the time of *actual possession*, and, therefore, if the factor, &c. deliver up the goods before payment of his account, his lien is gone, and he cannot stop the goods even *in transitu* (*y*). And in one case it was held that a delivery of part only destroyed the lien (*z*).

It is also decided, that if the factor, solicitor, or other person having a specific or general lien on goods in his hands take a specific security, the lien is totally gone (*a*), so far as respects the debt for which the security is taken.

(*x*) Kinloch *v.* Craig, 3 Term Rep. 119.

(*y*) Sweet *v.* Pym, 1 East, 2; *et vide* Amb. 254.

(*z*) *Ex parte* Gwynne, 12 Ves. jun. 383; *et vide* Crawshay *v.* Eades, 1 Barn. & Cress. 181.

(*a*) Cowell *v.* Simpson, 16 Ves. jun. 275.

CHAPTER XIX.

Of Assignments of Mortgage.

In equity, the mortgage debt is the principal, the land the accessory. An assignment of mortgage is, therefore, in equity, a transfer of a debt with its attendant securities; and, as the accessary always follows the principal, it results that when the debt is satisfied, the security is determined.

On this principle, equity holds, that on an assignment of mortgage, without the concurrence of the mortgagor, the assignee, standing in the place of the original creditor, is subject in all respects to the like equities and settlement of accounts as the mortgagee himself would be (*a*). In Matthews *v.* Wallwyn (*b*), Matthews mortgaged to Baker for 2000*l.* The mortgage being paid off by Shepheard, who was Matthews's attorney, Matthews executed to Shepheard a bond for 2000*l.*, and Baker assigned the mortgaged premises to Shepheard, who afterwards deposited the bond and deed with Hercy and Co. for 2000*l.* Hercy and Co. requiring payment, Shepheard applied

(*a*) Earl of Macclesfield *v.* Fitton, 1 Vern. 169; 1 Ch. Ca. 68; Matthews *v.* Wallwyn, 4 Ves. jun. 118; Williams *v.* Sorrell, *ibid;* Bradwell *v.* Catchpole, 3 Swanst. 79, note.

(*b*) *Supra.*

to Wallwyn and Co. to lend him 2000*l.* They agreed to open an account with him on a deposit of the securities and his own note of hand. The securities were accordingly redeemed out of the hands of Hercy and Co., and deposited by Shepheard with Wallwyn and Co. Shepheard became bankrupt; and subsequently, under a decree of Chancery, his assignees executed an assignment of the mortgage to Wallwyn and Co. Matthews had no notice of the dealings with Hercy and Co. and Wallwyn and Co. Shepheard had been in the habit of receiving and paying large sums on account of Matthews. The bill was filed by Matthews against Wallwyn and Co. for redemption; and it is stated that, subsequently to the settlement of an account between Matthews and Shepheard in October, 1794, which was subsequent to the deposit to Wallwyn, Matthews had discovered that Shepheard had received divers sums of money not accounted for by him, and that the latter had, since the settlement, received other sums, and that on deducting these sums, a considerable balance would be due to Matthews. Wallwyn and Co. submitted that they had a specific lien for their balance. The Lord Chancellor, after stating the question to be whether the assignee of a mortgage had a right to be paid according to the sum that appeared due on the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee, and noticing the practice of conveyancers not to recommend as a good title an assignment of a mortgage, without making the mortgagor a party, and being satisfied that the money was really due, proceeded to state the particulars of the case of Lunn *v.* Lodge

and others, from a note of the case in his possession; from which it appeared that Lodge mortgaged to Pitman, who assigned to Saint John. Lodge and Pitman both became bankrupt. The bill was filed by the assignees of Lodge, insisting that nothing was due between the estates. Lord Thurlow directed the Master to inquire "what was due at the time of the mortgage? what was due at the time of the assignment? and what remained due?" The Master reported that 7000*l.* was due *from Pitman to Lodge;* and it was decreed that the assignments were void against the estate of Lodge. This, the Lord Chancellor said, was a direct authority in favour of Matthews. He then noticed that if an action was brought on the bond in the name of the mortgagee, which, the bond not being assignable at law, it must be (*a*), the mortgagor would pay no more than was really due on the bond; and if an action was brought on the covenant, the account must be settled in that action; and in a Court of Equity, the condition of the assignee could not be better than it was at law. Therefore the plaintiff must be at liberty to redeem upon payment of what the Master should find due on the original mortgage to Shepheard; and he directed the account to be taken in exactly the same way as Lord Thurlow had done, viz. an account of what was due at the time of the mortgage; what was due at the time of the assignment; and what was then due.

(*a*) As to this, see remarks *infra* on the case of the debt being secured by an *assignable instrument*.

The case of Matthews *v.* Wallwyn is a leading authority, that the mortgagor not concurring in the assignment, is not bound by the amount appearing due on the face of the mortgage. In a case (*c*) decided soon after that of Matthews *v.* Wallwyn, the same doctrine was acted upon. It appeared that Sorrell mortgaged to Clifton. Clifton assigned to Williams, without the concurrence of Sorrell, who, after the assignment, and without notice of it, made several payments to Clifton. The property was leasehold, lying in Middlesex, and the deed of assignment was registered. The bill was filed by the assignee, praying a foreclosure, and charging the mortgagor with notice by reason of the registry; but the point was scarcely contended by the counsel for the plaintiff. The decree was, that the defendant might redeem on payment of what was due, deducting the payments made to Clifton. In this case the mortgagor had made a tender of *the balance* to the assignee, subsequent to the filing of the bill; in consequence of which the costs of the suit were allowed the assignee up to the time of the tender only.

This doctrine has been confirmed by Lord Eldon (*d*), and may be considered as settled, as well in respect to payments before and after the assignment as also on a running account. The concurrence of the mortgagor in the assignment of a mortgage consequently should, if possible, ne-

(*c*) Williams *v.* Sorrell, 4 Ves. jun. 389.

(*d*) Chambers *v.* Goldwin, 9 Ves. jun. 254.

ver be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be had of obtaining a covenant from the mortgagee, that the money alleged to be owing is actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay.

The mortgagor not being bound by the settlement of account between the mortgagee and assignee, *à fortiori* he cannot be prejudiced by any agreement between them to increase the amount of the *principal* due; and, consequently, the arrears of interest at the time of the assignment cannot, generally speaking, without his concurrence, be converted into principal, and tacked to the mortgage (*e*). And even with his consent, the interest cannot *with notice* be tacked to the prejudice of other creditors having then a lien on the estate (*f*). But it is submitted that as equity will on the settlement of accounts allow the necessary costs of defending and maintaining the title (*g*), renewal of leases (*h*), and the like, with interest in the mean time, the amount of such costs may on an assignment be tacked to the principal, and will carry interest without the mortgagor's con-

(*e*) Macclesfield *v.* Fitton, *supra*; Ashenhurst *v.* James, 3 Atk. 271; Porter *v.* Hubbard, 3 Atk. ch. 78; *et vide* Matthews *v.* Wallwyn, *supra*.

(*f*) Digby *v.* Craggs, Amb. 612.

(*g*) Godfrey *v.* Watson, 3 Atk. 518.

(*h*) Lucam *v.* Mertins, 1 Wils. 34; Manlove *v.* Bale, 2 Vern. 84.

currence, and have preference to other subsisting charges.

A further advantage arising from the concurrence of the mortgagor in the assignment is, that in such case the mortgagee need not be made a party to a bill of redemption, which otherwise is necessary, that he may account for the profits received in his time (*i*).

There is another most important point to be attended to by the mortgagee in an assignment of mortgage, viz. that if he is *in possession*, he is considered in equity, in some measure, in the light of a trustee, and accountable for the profits; and, therefore, if without the assent of the mortgagor, he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* to the assignment (*k*), on the principle that, having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate. A query is added in Equity Cases Abridged, whether, if the mortgagor hides, so that he cannot be served with a *subpœna*, the mortgagee in possession may not assign without being accountable for the subsequent profits; but the query only tends to shew the general rule.

If the assignee is a *purchaser* of the mortgage debt, or, in other words, pays a less sum for it than the amount due, he will be entitled to the full benefit

(*i*) 2 Eq. Ca. Ab. 594. (*k*) 1 Eq. Ca. Ab. 328.

of his purchase (*l*). It has, however, been questioned, and an attempt made to confine the purchaser to the amount of the sum which he actually paid on the assignment; but, as observed by Lord Cowper, since he runs the hazard of a loss, he ought to have the benefit of the gain (*m*). If indeed the purchaser is in the situation of *a trustee* for the owner of the estate, then equity will hold that he made the purchase for the benefit of the estate, and consequently an executor, or guardian, or trustee, shall be only repaid the sum which he actually gave (*n*). In like manner, if the *heir at law* is the purchaser, and there be judgment or specialty creditors, he shall not have the benefit of the assignment beyond the amount of the purchase to their prejudice (*o*); and the like doctrine was, in one case (*p*), attempted to be extended to the instance of a purchase by a stranger to the estate, but Lord Hardwicke has remarked (*q*), he knew no subsequent case in which it had been laid down as a general rule, but held only with regard to agent, trustee, heir at law, or executor (*r*). And even with regard to those persons, if the mortgage is purchased

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(*l*) Phillips *v.* Vaughan, 1 Vern. 336; Baker *v.* Kellett, 3 Rep. Ch. 13; Nels. 117; Anon. 1 Salk. 155; Ascough *v.* Johnson, 2 Vern. 66; Morrett *v.* Paske, 2 At. 53; Darcy *v.* Hall, 1 Vern. 49.

(*m*) Anon. 1 Salk. 154.

(*n*) Morrett *v.* Paske, *supra.*

(*o*) Braithwaite *v.* Braithwaite, 1 Vern. 335; Long *v.* Clopton, *ibid.* 464.

(*p*) Williams *v.* Springfield, 1 Vern. 335, 476; *et vide* Long *v.* Clopton, *supra.*

(*q*) Morrett *v.* Paske, 2 Atk. 53, 54.

(*r*) *Et vide* Bromley *v.* Holland, 5 Ves. jun. 620.

for the purpose of protecting a subsequent incumbrance to which they are entitled in *their own right*, they may take the full benefit of the prior security (*s*). In a subsequent chapter, this doctrine will be more fully dilated on. These general observations may be therefore sufficient in this place.

At law, the debt being a chose in action, is not, in general, assignable. A power of attorney must be therefore given by the mortgagee to the assignee, to enable him to proceed in his name on the covenant and bond. The debt may, indeed, under special circumstances, be assignable at law as if secured by a negotiable instrument, such as a bill of exchange, which passes by indorsement; and Mr. Powell (*t*) has suggested, whether in such a case the general rule before stated (*u*), as to the liability of the assignee to the state of the account between the mortgagor and mortgagee would apply; for the assignee or indorsee has a legal right in the debt, and a legal remedy at law, which equity will not take from him. There certainly seems considerable force in the reasoning.

(*s*) Darcy *v.* Hall, 1 Vern. 49.

(*t*) Powell on Mortgage, page 973, 4th edit.

(*u*) *Supra*, p. 215.

CHAPTER XX.

STAMPS.

THE amount of the proper stamps to be placed on the deed of mortgage security is frequently the subject of much doubt and perplexity.

This has arisen from the obscure language used in the stamp acts, which might, it may be thought, have been avoided with little trouble.

As a preliminary remark, however, it should be observed, that the fiscal laws do not in general alter the operation of the laws of property; and therefore a deed of conveyance without any stamps will pass the estate. But the instrument will not, until stamped, be receivable in evidence; the consequence is, that when the stamp is affixed to the deed, it will take effect from the time of its delivery, as if the stamp had been then placed on it, and not from the time when the stamp is affixed on the deed.

It has recently been decided by the judges of the Court of King's Bench that if a deed is produced to them bearing the proper stamp, but which is proved not to have been stamped at the time of its execution, the Court will receive it in evidence,

without inquiring whether the stamp was affixed on payment of the proper penalties (*i. e.* 10*l.* or 5*l.*), nor will the memorandum by the commissioners of stamps indorsed on the deed, of the payment of 5*l.* be admissible as evidence of the actual amount of penalty paid. But if the revenue laws require the stamp to be affixed within a given period, the Court will, in such case, inquire into the time when the deed was stamped (*a*).

The laws at present in force relating to the stamps on mortgages are the 55 Geo. III. cap. 184, for Great Britain; the 56 Geo. III. cap. 56, for Ireland; and the 3 Geo. IV. cap. 117, for both countries.

The 55 Geo. III. and 56 Geo. III. imposed the duties on mortgages, in Great Britain and Ireland, as they are still payable; and on this point it may be necessary to observe, that if on the sale of an estate, part or the whole of the purchase money is raised by loan, and the estate is conveyed to the lender, subject to redemption by the purchaser, the *ad valorem* duty on sales to the full amount of the purchase money, and the *ad valorem* duty on mortgage to the amount of the sum borrowed, will be both payable.

These statutes have provided, that if the security is made to different persons for different and separate sums of money, the duty shall be charged in

(*a*) Rex v. the Inhabitants of Preston, 3 Nev. & Man. 31.

respect of each separate sum, and not on the aggregate amount thereof. But it has decided, notwithstanding the enactment, if a mortgage is made to several persons for a sum, which is in fact composed of several debts due to them separately, but which fact does not appear on the face of the deed, although proved by evidence, yet an *ad valorem* duty on the entire sum is sufficient (*b*).

The difficulties and doubts have chiefly arisen on the assignment and transfer of mortgages.

The Stamp Acts provided, that on any transfer or assignment of any mortgage, in all cases where the person entitled to the right of redemption or reversion should *not* be made a party to such transfer, and also where the person who originally made the mortgage should continue entitled to the right of redemption or reversion, *and should* be made a party to such transfer, the common deed stamp only should be payable, *provided no further sum of money or stock be added to the principal money or stock already secured.* The act then provided that in *all other* cases such transfer should be charged with the same duty or duties as an original mortgage.

The effect of that clause was, that if the equity of redemption was granted away to a stranger previously to the assignment of the mortgage, and the grantee of the equity concurred in the assignment

(*b*) Reed *v.* Wilmot, 7 Bingh. 577.

the full duty was again payable; which legislative enactment was founded on the idea that the assignee obtained the further personal security of the grantee.

But a question was raised on the effect of the clause dispensing with the payment of the mortgage duty on the assignment of mortgage, *provided no further sum of money or stock was added to the principal money or stock already secured*, followed by the clause directing that in *all other* cases the assignment should be charged with the same duty as an original mortgage. If these united clauses were taken in their literal meaning it certainly seemed to follow, that in *every* case in which a sum of money was added on the assignment of a mortgage, the full duty on the whole was payable, and from the observations made by the Lord Chief Justice of the Court of King's Bench in the case of Doe *v.* Gray, hereafter noticed, it appears that such was the true construction of the statute, although it is difficult to conceive that such could have been the intention of the legislature, because the provision would be frustrated by the simple operation of an assignment of the original mortgage, and an indorsement dated next day, by way of a further charge for the additional sum, and it could not be presumed, that the legislature meant to affix the heavy duty merely on the form of making the additional mortgage.

The Stamp Acts contained an exception from the mortgage duty of deeds made for the further assurance of property on which the mortgage duty had been

already paid, and a further exception, of deeds made as an additional or further security for sums on which the duty had been paid, in case such additional security was made by the same person who made the original security. But if any further money was added, the duty was to be paid in respect of such further sum.

To remove the doubts raised on these acts, the 3 Geo. IV. cap. 117, was passed, which repealed the duties imposed by the 55 Geo. III. and 56 Geo. III. on transfers of mortgage, but which, by adopting in part the language of the former acts, has created some further difficulties.

It may in the first place be observed, that in the commencement of the 2d section of the act, containing the enactment of the duties on assignments and transfers, as it appears in the copies printed by the King's printer, the words "*Great Britain*" are by mistake omitted, although those words are inserted in the subsequent parts of the section, shewing the intention of the legislature. And from the note in 4 Neville and Manning, p. 721, it may be collected, those words are actually on the Parliamentary Rolls.

This latter statute has enacted(*c*), "that from and after the expiration of ten days next after the passing of that act, in lieu and instead of the duties by that act repealed, there shall be granted, raised, levied,

(*c*) Section 2.

collected and paid *in Ireland* unto his Majesty, his heirs and successors, the several sums of money and duties following, that is to say, upon any transfer, *assignment*, disposition, assignation, or reconveyance of any mortgage, or of any other security in the said acts and the schedules thereto annexed, in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, *provided no further sum of money or stock be added to the principal money or stock already secured*, there shall be paid in Great Britain a stamp duty of 1*l.* 15*s.*, and in Ireland a stamp duty of 1*l.*, British currency, for the first skin or piece of vellum, or parchment, or sheet or piece of paper upon which such transfer, assignment, disposition, assignation, or reconveyance, shall be ingrossed, written or printed, and where any such transfer or assignment, disposition or assignation in Great Britain, thereby charged with the duty of 1*l.* 15*s.*, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080, there shall be paid a further progressive duty of 1*l.* 5*s.*; and for every skin or piece of vellum or parchment, or sheet or piece of paper beyond the first, upon which any such transfer, assignment or reconveyance shall be ingrossed, written, or printed, in Ireland, there shall be paid the sum of ten shillings British currency; *and if any further sum of money or stock shall be added to the principal money or stock already secured, the* ad valorem *duty on mortgages payable under the said recited acts respectively, shall be*

charged only in respect of such further sum of money or stock.

And further (*a*), that where any deed or other instrument already made, or thereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or the Bank of Ireland, already or previously secured by any bond on which the *ad valorem* duty on bonds charged by the said recited acts of the 55th and 56th years of the reign of his late Majesty, and the schedules thereto respectively annexed, shall have been paid, such deed or other instrument shall be, and be deemed to be and to have been exempt from the several *ad valorem* duties charged by the said acts and the said schedules respectively on mortgages, and shall be charged and chargeable only with the ordinary duty payable on deeds in general in Great Britain and Ireland respectively. But if any further sum of money or stock shall be added to the principal money or stock already secured, the said *ad valorem* duties respectively shall be charged in respect of such further sum of money or stock, and if necessary for the sake of evidence the deeds and instruments thereby exempted from the said *ad valorem* duties shall be stamped with a particular stamp, for denoting or testifying the payment of the *ad valorem* duty upon all the deeds and instruments relating to the particular transaction,

(*a*) Section 3.

provided such deeds and instruments shall be produced at the Stamp Office in London or Dublin, (as the case may require,) and shall appear to be duly stamped with the duties to which they are liable."

On this statute a question has in practice arisen, whether, in case a further sum of money be added at the time of transfer, a double duty is not payable, viz. in England, the 1*l.* 15*s.* with the progressive duty of 1*l.* 5*s.* in respect of the transfer, and the *ad valorem* duty on the first skin in respect of the additional sum advanced, and in many cases both the duties have been paid by way of precaution.

In a case in the Court of Common Pleas (*a*), it appeared that a mortgage had been made to Miss Eborall for 2000*l.* The mortgagor requiring a further sum, other parties agreed to lend 2934*l.* in discharge of the first mortgage and as a further advance; two deeds were executed, one being a transfer of mortgage from Miss Eborall to the new mortgagees. On this a duty of 6*l.* was paid. The other was a conveyance of *additional estates*, for securing the full sum of 2934*l.*; on this a duty of 2*l.* was paid for the additional sum.

The Court of Common Pleas seem to have taken the two deeds together as one transaction, and to have held, that the advance of 934*l.* took the case out of the second section of the statute of 3 Geo. IV. by reason of the words "provided no further sum

(*a*) *Ex parte* Martin, 5 Bingham, 160.

be added to the principal sum already secured," and that it was not within the third section of that act, (which it clearly was not,) as that section applies only to cases of duty already paid on *bonds*, but this escaped the attention of the judges, who decided the point on the ground that the third section only applied to transactions between the same parties; the Court therefore, it seems, decided that the 6*l.* was properly paid, not taking into consideration the latter part of the second section, which confines the mortgage duty to the additional sum.

The question of proper amount of duty has recently come before the judges of the Court of King's Bench (*a*), who appear to have taken a correct view of the subject.

According to the printed case, a sum of 150*l.* had been lent by Rowland to Carter on the security of a mortgage term. Worsley afterwards paid off Rowland, and advanced Carter a further sum of 200*l.* Carter conveyed the fee of the land to Worsley for securing 350*l.*, and Rowland assigned the term to a trustee for him. The release was on four skins; the first skin had an *ad valorem* stamp of 2*l.* for the additional sum, and also a stamp of 1*l.* 15*s.* for the assignment, and the other skins had stamps of 1*l.* each, making together 6*l.* 15*s.*

It was objected, that the stamp was not sufficient; that there should have been paid 4*l.* as on an original

(*a*) Doe v. Gray, 3 Adol. & Ellis, 89; 4 Neville & Manning, 720.

mortgage for 350*l.*, and three stamps of 1*l.*, making together 7*l.* or that, in addition to 2*l.* and 1*l.* 15*s.* actually paid, there should have been three sums of 1*l.* 5*s.*, making together 7*l.* 10*s.*

The Court held that as a further sum was added, the transfer duty under the 3 Geo. IV. was out of the question; the words of the statute being "provided no further sum of money be added." But the effect of the other part of the clause was to make the deed an original mortgage for 200*l.*, for which a duty of 2*l.* was payable under the 55 Geo. III., with progressive stamps of 1*l.* each, being the stamps actually on the deed.

As to the argument that it was an original mortgage for 350*l.*, by reason of the conveyance in fee, the Court held, that the case did not fall within the exemption of the third section of the 3 Geo. IV., which applies only to cases where the duty on *bonds* has been already paid, but that the question turned on the exemption clause of the 55 Geo. III., in respect of deeds executed by way of further security, charging the *ad valorem* duty on any further sum added; and that as the deed was not a mere further assurance, but also an assignment of the original mortgage, it would not, prior to the 3 Geo. IV., have been within the exemptions of the 55 Geo. III., but would have required the full duty of 4*l.* The 3 Geo. IV. had, however, repealed the transfer duties of the 55 Geo. III., and substituted the same *ad valorem* duty of 2*l.* on the transfer in respect of the additional sum, as the exemption clause

had already charged on the new security in respect of the additional sum, and as the *ad valorem* duty depended on the sum secured, and not on the number of the securities, and was only to be paid once, it followed that the case was the same in effect as if the *ad valorem* duty of 2*l.* had been charged on the transfer, and afterwards the fee had been conveyed as a further security for the whole 350*l.*, in which case a common deed stamp only would have been required. Whether a common deed stamp was necessary, the Court did not think it material to inquire, as the 1*l.* 15*s.* stamp erroneously put on the deed was sufficient to cover that stamp, if requisite.

From this case the conclusion may be drawn, that on a transfer of mortgage with a further advance, the *ad valorem* duty is payable only on the additional sum, with followers of 1*l.*, on each skin, even although other estates are added, provided the mortgagor is the same party who created the original security, subject to the doubt thrown out by the Court of King's Bench, whether, in such last mentioned case, the common deed stamp may not be also requisite.

In the last session of parliament a bill was introduced for the consolidation and amendment of the stamp laws; by which it was proposed to enact, that on any transfer or assignment, disposition or assignation of any mortgage, wadset or bond, or of any such other security as aforesaid, or of the benefit thereof, and of the money or stock thereby secured, if no further sum of money or stock shall be added

to the principal money or stock already secured, then where the amount of the principal money or the value of the stock secured by such mortgage, wadset, or bond shall not exceed 300*l.*, the same duty shall be paid as on a mortgage, wadset, or bond for such principal money or stock. And where the same shall exceed 300*l.* then 1*l.* 15*s.* in Great Britain, and 1*l.* in Ireland. And if any further sum of money or stock shall be added to the principal money or stock already secured, then the same duty as on a mortgage, wadset, or bond for such further sum of money or stock only. It is probable this will be passed into a law in the next session.

BOOK THE THIRD.

CHAPTER I.

OF THE RELATIVE ESTATES OF MORTGAGOR AND MORTGAGEE.

HAVING treated of the origin, nature, and different modes of mortgage, it is next to be considered in what respective relative situations the mortgagor and mortgagee, until redemption or foreclosure, stand to each other; and to what privileges and restrictions they are, during that period, respectively entitled or subject.

On the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land; in which respective situations they remain until the land is redeemed or foreclosed. In the interim, the land and all its profits form a security for the debt. These general principles govern the decisions on this branch of the law of mortgage.

In most mortgage deeds, a proviso is inserted that until default made in payment by the mortgagor, &c., he and his heir may hold and enjoy the land and

receive the profits without interruption by the mortgagee or his heir. In some instances, however, the mortgage is made without such precaution.

There is some obscurity in the books in what light the mortgagor, during the period of actual possession, or receipt of the rents of the land, stands in respect to the mortgagee. The result of the cases however appears, that he may be considered as tenant for a term, or at will, or by sufferance, or a trespasser, according to circumstances.

The Court of King's Bench has decided that the mere receipt of *interest* from the mortgagor is not a recognition by the mortgagee, that the mortgagor or his tenant was at that time in lawful possession (*a*), and it therefore was no defence to an ejectment in which the demise was laid on the first day of July, 1830, although it was proved that on the 15th day of January, 1831, the mortgagee had admitted payment of interest up to the 25th of December, 1830, being subsequent to the demise.

But this must be distinguished from the case of *rent* eo nomine, demanded and received by the agent of the mortgagee from the tenant of the mortgagor in payment of interest, which would prevent the tenant being treated as a trespasser (*b*).

In the case of Doe *v.* Maisey (*c*) Lord Tenterden

(*a*) Doe *v.* Cadwallader, 2 Barnewall & Ad. 473.

(*b*) Doe *v.* Hales, 7 Bingh. 322.

(*c*) 8 Barnewall & Cresswell, 767; 3 Manning & Ryland, 109.

is reported to have said, that a mortgagee in possession was not in the situation of tenant at all; or at all events, he was not more than tenant at sufferance, and that in a particular character, liable to be treated as tenant or trespasser, at the option of the mortgagor. But in a prior case (*d*), the Court of King's Bench appeared clear in opinion that the mortgagor might be considered as *tenant* in the strictest definition of that word, for the purpose of enabling the mortgagee to maintain an action against a trespasser.

In Moss *v.* Gallimore (*e*), in which the estate was in the hands of tenants, the mortgagor was considered as a *receiver* for the mortgagee; but Lord Eldon (*f*) expressed his surprise at this doctrine, and said it was a misapplication of the principles of equity. In the earlier case of Birch *v.* Wright (*g*), Mr. Justice Buller considered it sufficient to designate the parties as *mortgagor and mortgagee*, without having recourse to any other description; and he considered a mortgagor was neither a tenant at will nor receiver, nor was it necessary he should be so, for a mortgagor and mortgagee were characters as well known and their rights, powers, and interests as well settled as any in the law. But this view of the question does not meet the difficulty, for the rights, powers, and interests of mortgagor and mortgagee, are in many instances grounded on their respective

(*d*) Partridge *v.* Bere, 5 Barnewall & Ald. 604.
(*e*) Douglas, 283.
(*f*) See *Ex parte* Wilson, 2 Vesey & Beames, 252.
(*g*) Term Rep. 383.

estates in the land; and therefore, we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee independently of some other known estate or interest in the land; for the *estates* both of mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can, as such, be regarded in a court of law, although the possession of the mortgagor may, as noticed in the next chapter, confer on him certain privileges under the statute law and poor laws. In addition to which it may under circumstances become essential to ascertain, whether at common law there is any, and what privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or, under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case, if he is to be considered as tenant at sufferance, or an agent or receiver. So long as the mortgagor is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy of some sort between the parties (*h*); or otherwise the mortgagor must be a trespasser, for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or a mesne lord. The

(*h*) Partridge v. Bere, 5 Barnewall & Alderson, 664. But see and consider what is said by Lord Tenterden in Doe v. Maisey, *supra*.

mortgagor in possession must hold of some one, and to say that his possession is that of a mortgagor, is in fact leaving the question undecided.

If in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor, *until* default in payment &c., and the mortgagor is in actual possession, he must, it is thought, during the continuance of that agreement, be considered as tenant to the mortgagee, holding for a term (*i*).

If in the case of such agreement the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, or if the mortgage deed contains no such agreement, he may be considered as tenant at sufferance, or treated as a trespasser (*k*), although the mortgagee has been in the receipt of interest on the mortgage debt; and in every case, except where there is an actual agreement for the occupation by the said mortgagor until a certain period, the conti-

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(*i*) Powseley *v.* Blackman, Cro. Jac. 659. In a note to the case of Doe *v.* Maisey, 3 Manning & Ryland, 109, it is considered that the case of Powseley *v.* Blackman does not bear out the above proposition. But, on perusing the case it will be seen, it was admitted that if the proviso *had been* in the form in the text, it would have amounted to a demise for a term. In the note it is ingeniously suggested that a mortgagor may be considered as tenant in fee determinable, as in the case of a shifting use under a marriage settlement, but this would be repugnant to the use already limited to the mortgagee in fee.

(*k*) Doe *v.* Maisey, *supra.*

nuance of the mortgagor in possession, if with the consent of the mortgagee, must be construed strictly as a tenancy at will (*l*).

If the mortgage is transferred to another (*m*), the mortgagor becomes tenant by sufferance to the assignee.

Although the mortgagor is equitable owner, yet the mortgagee is more than a trustee for him, for a trustee is not allowed to deprive his *cestui que trust* of his possession, but a mortgagee may assume the possession whenever he pleases (*n*), if there is no agreement to the contrary, and in point of possession, the mortgagor is tenant at will even in equity, for a Court of Equity never interferes to prevent the mortgagee from assuming the possession (*o*).

(*l*) Keech *v.* Hall, 1 Dougl. 22.

(*m*) Smartle *v.* Williams, 3 Lev. 387, and 1 Salk. 245; Thunder *v.* Belcher, 3 East, 449.

(*n*) Doe *v.* Maisey, *supra*.

(*o*) *Per* Master of the Rolls in Cholmondeley *v.* Clinton, 2 Merivale, 359.

CHAPTER II.

OF THE PRIVILEGES ATTENDING THE ESTATE OF THE MORTGAGOR.

WITH whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times, the doctrine of the courts of equity, recognizing the mortgagor (until foreclosure) to be the actual owner of the land, has to a certain extent, with reference to the possession by the mortgagor, been acted upon, as well by the courts of common law, as by the legislature.

The statute law (*a*) has provided, that the mortgagor in possession shall have the privilege of voting for the return of members to parliament notwithstanding the mortgage.

At common law his title of ownership while in possession is so far recognized as to gain him a settlement under the poor laws (*b*), but for this purpose he must reside within ten miles of the property (*c*), and be in possession in his capacity of mortgagor, and not by fraud or wrong; and in a case (*d*), in

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(*a*) 7 & 8 Will. 3, c. 25, s. 7; 2 & 3 Will. 4, c. 45, s. 23.
(*b*) Dougl. 932; 3 Term Rep. 771.
(*c*) 4 & 5 Will. 4, c. 76, s. 68, a.
(*d*) Rex *v.* The Inhabitants of Catherington, 3 Term Rep. 771.

which a mortgagee of several messuages having recovered in ejectment, afterwards permitted the mortgagor to inhabit one of the houses for a particular purpose, *i. e.* the overlooking of some repairs, the Court of King's Bench held, that no settlement was gained by such latter residence, for he was not in possession *as mortgagor*. And in another case (*d*) in which an estate had been conveyed to trustees, upon trust to sell for payment of debts, and to pay the residue to the grantor, the grantor before sale got fraudulently into possession, and it was held, he did not by such residence gain a settlement.

A very considerable privilege annexed to the estate of the mortgagor is, that he is not bound to account for the rents and profits while in possession, even although the security shall prove insufficient. For this, the case of Colman *v.* The Duke of St. Albans is in point (*e*). In that case it appeared that the office of register of the Court of Chancery had been granted by King George the First, by letters patent, to Charles Duke of St. Albans, George Earl Cholmondeley, and Lord James Beauclerk for their lives, and the life of the survivor of them, in trust for the Duke, his heirs and assigns. The Duke subsequently assigned one moiety of the fees of office to William Day for securing a sum of money. The Duke and William Day afterwards concurred in an assignment of both moieties to the Archbishop of Canterbury for securing 6000*l.* and interest. On the

(*d*) Rex *v.* The Inhabitants of St. Michael's, Dougl. 630.
(*e*) 3 Ves. jun. 25.

death of Charles Duke of St. Albans, George Duke of St. Albans, his heir at law, entered on the office and received the fees. The mortgage ultimately vested in Bridget Crewys, who joined with Duke George in a surrender to the crown of the grant, and a fresh grant was afterwards obtained for the lives of George Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerc, afterwards Duke of St. Albans, and the life of the survivor, in trust for Duke George, his heirs and assigns. This grant was assigned to Bridget Crewys. George Duke of St. Albans and Charles Beauclerc afterwards died, and Aubrey, then Duke of St. Albans (the only surviving life) entered and took the profits. A bill was filed by the executors of Bridget Crewys against Aubrey Duke of St. Albans, charging that as there was no other life in the grant except the Duke, the office itself was an insufficient security for the 6000*l.* and interest, and that the defendant ought to account to the plaintiffs for the fees and emoluments received by him, and for any future fees and emoluments, and that the plaintiffs ought to be let into possession; and praying an account of principal and interest, and for a foreclosure, and that a value might be set on the office, or that the office might be sold, and in case of a deficiency, the defendant might account for the fees received by him. The plaintiff demurred to so much of the bill as prayed an account of the fees and emoluments received by him anterior to the instituting of the suit, and the demurrer was allowed.

In a more recent case in equity(*f*), a mortgage was

(*f*) *Ex parte* Wilson, 2 Ves. & Beames, 252.

made for 1000*l.* the property was in lease. The mortgagor became bankrupt. The mortgagee gave the tenant notice to pay the rent to him. The assignees nevertheless received the rent. The mortgagee petitioned that the assignees might be ordered to pay to the petitioner the rent received. Lord Eldon said, "that admitting the case of Moss *v.* Gallimore (*g*) to be sound law, he had been often surprised by the statement that the mortgagor was *receiving* the rents *for the mortgagee.* A mortgagee never could, in that court, make the mortgagor account for the rent for the time past. There was no instance that a mortgagee *per directum* had called on the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rent for the mortgagee." The petition was dismissed.

This latter case carries the principle to a great extent, if it can be supposed that the assignees were aware of the notice given; for, in such case, they could hardly be considered as acting conscientiously; and they must, it is conceived, have subjected the tenant to the distress or action at common law of the mortgagee, for the amount paid to the assignees.

From the language of Lord Eldon in this case his opinion may be gathered that a mortgagor cannot be viewed in the light of *a receiver;* and, in fact a receiver without liability to account appears a contradiction in terms, it being in truth an *ownership.*

(*g*) 1 Dougl. 282, *et vide* 390.

The act of the 7th of Geo. II. cap 20, claims particular attention. That act recites, that mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of Equity to foreclose their mortgagors from redeeming their estates; and the Courts of Law where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interest due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a Court of Equity for that purpose; in which case likewise the Courts of Equity do not give relief until the hearing of the cause, for remedy whereof it enacts, that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham by any mortgagee, his heirs, executors, administrators or assigns, for the recovery of the possession of any mortgaged lands; and no suit shall be then depending in any of his Majesty's Courts of Equity in England, for or touching the foreclosing or redeeming of such mortgaged lands, if the person having right to redeem such mortgaged lands, and

who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee or, in case of his refusal, shall bring into court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is depending, or by the proper officer by such court to be appointed for that purpose) the monies so paid to such mortgagee or brought into such court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may, by rule of the same court, compel such mortgagee at the costs of such mortgagor to assign, surrender, or recover such mortgaged lands, and such estate and interest as such mortgagee hath therein, and deliver up all the deeds, evidences, and writings in his custody, relating to the title thereto, unto such mortgagor who shall have brought such monies into the court, his heirs, executors, or administrators or to such other person as he shall for that purpose nominate or appoint. And that where any bill or suit shall be filed, commenced, or brought into any Courts of Equity in England by any person having or claiming any estate, right, or interest in any lands, under or by virtue of any mortgage thereof to compel the defendant in such suit having or claiming a right to redeem the same to pay the plaintiff in such suit, the principal money and inte-

rest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof, and in default of payment thereof to foreclose such defendant of his right of redeeming such mortgaged lands, &c.; such Court of Equity, where such suit shall be depending, upon application made by the defendant having a right to redeem such mortgaged lands, and *upon his admitting the right and title of the plaintiff in such suit,* may and shall at any time before such suit shall be brought to hearing, make such order or decree therein as such court might have made in case such suit had then been regularly brought to hearing, and all parties to such suit shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit. But it is provided, that the act shall not extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into such court, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem, or *that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side,* nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the

same cause or suit, nor shall be any prejudice to any subsequent mortgagee or incumbrancer.

On this beneficial statute several cases have arisen. It has been decided in equity (*h*), that if the bill embraces any object distinct from the foreclosure of the mortgage, as, for example, if it sets up another demand on the defendant, and prays it may be also a charge on the estate, no order of reference can be made under the statute. Lord Eldon has remarked, that the justice of the case seems to be, that the reference should be made as to the mortgage, and the cause go on as to the rest, but he had never known it done.

The application for the reference in equity, must be made before the mortgagee is entitled to sue out execution at law (*i*), and will not be granted, if the mortgagor is in contempt (*k*).

It has been stated by judges of high authority, that the Courts of Equity did not require the aid of the legislature for the purpose mentioned in the act, and that the real object of the act was, to give a new authority to the Courts *of Law*, the section as to Courts of Equity being merely incidental and unnecessary. And therefore, in a case in which the bill filed by the mortgagee prayed a sale, and not a foreclo-

(*h*) Bastard *v.* Clark, 7 Ves. jun. 489.
(*i*) Amis *v.* Lloyd, 3 Ves. & Beames, 16.
(*k*) Hewitt *v.* M'Cartney, 13 Ves. jun. 560.

sure, and the mortgagor prayed a reference to the Master to take an account, &c., the Vice-Chancellor, after stating that the case was not within the statute, said, he considered that Courts of Equity had an inherent jurisdiction to stay proceedings in any cause, and in any stage of any cause, whenever the defendants would submit to a decree establishing the full demand made by the bill and the whole relief prayed in respect of that demand, with costs, and he was fully prepared to make such an order as the plaintiff would be entitled to at the hearing, with costs (*l*).

A Court of Law has decided, in reference to this statute (*m*), that if a mortgagor contracts to sell to the mortgagee his equity of redemption, and the mortgagee, before the completion of the contract, proceeds by ejectment to evict the mortgagor from the possession, the court will not stay the proceedings on tender of principal, interest, and costs; on the ground that the mortgagor has now no right to redeem, and that a Court of Equity would decree him to complete the contract. It may, however, be proper to remark, that according to another reported case (*n*), but which is not fully nor correctly stated, the mortgagee should tender a deed of conveyance to the mortgagor, or file his bill in equity for a completion of the contract as a ground for the court to reject the motion for a stay of proceedings.

(*l*) Praed *v.* Hull, 1 Simons & Stuart, 331.

(*m*) Goodtitle *v.* Pope, 7 Term Rep. 186.

(*n*) Skinner *v.* Stacey, 1 Wils. 80.

If the mortgagee commence an action at law against the mortgagor, and afterwards receive notice from a subsequent mortgagee not to part with the title deeds, the case is nevertheless within the statute, and a rule will be granted directing him, on payment of principal, interest and costs, to deliver them up to the mortgagor (*o*).

In equity it has been determined that the reference to the Master under the statute, must proceed on an admission that the principal and interest, mentioned in the foreclosure bill, are due; and the Master cannot admit evidence to shew the contrary (*p*). In the case alluded to, the bill was filed for foreclosure of a mortgage for 392*l.* 4*s.* 3*d.* The defendant petitioned for a reference to the Master under the statute, and stated in his petition that the principal sum due was reduced to 340*l.*, and that the interest on the mortgage had been paid up to August 1792. The order for reference was made. The Master admitted evidence to shew these facts, and reported accordingly. Two exceptions were taken to the Master's report. First, that he ought to have certified that the whole principal sum of 392*l.* 4*s.* 3*d.* was due on the mortgage, the defendant having by the decretal order admitted the fact; and secondly, that he ought to have reported, that the interest was due from the 4th of August, 1778, up to the 18th November, 1794, when the plaintiff took

(*o*) Dixon *v.* Wigram, 2 Crompton & Jervis, 613.

(*p*) Huson *v.* Hewson, 4 Ves. jun. 105.

possession. In support of the exceptions it was argued, that the consequence of a reference under this statute is that the defendant admits the principal and interest to be due. For the defendant it was urged, that under the statute the inquiry was to be made as usual. The Lord Chancellor said he did not see what answer there was to the statute, and he thought if it had been attended to, the order should not have been made. He did not know how to get rid of the objection, and allowed the exception.

The time appointed for the payment of the mortgage money may be enlarged under the statute, in like manner, as if the cause was brought to a hearing (*q*), as will be hereafter noticed (*r*).

A further privilege annexed to the estate of the mortgagor has been already noticed (*s*), viz. the right, where an advowson is the subject of the mortgage, of nominating to the church on an avoidance of the living.

(*q*) Wakerell *v.* Delight, 9 Ves. 36.

(*r*) *Vide infra.*

(*s*) *Vide supra*, page 273.

CHAPTER III.

OF THE RESTRICTIONS AND DISABILITIES ANNEXED TO THE ESTATE OF THE MORTGAGOR.

ALTHOUGH in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee.

On this principle equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on bill filed by the mortgagee (*a*).

Equity also will in no instance, it seems, interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but for such purpose will consider the latter a mere tenant at will (*b*).

The mortgagor is liable to eviction by the mortgagee without any notice whatever (*c*), unless protected

(a) Farrant *v.* Lovel, 3 Atk. 723; *et vide* Robinson *v.* Litton, ibid. 210.

(*b*) *Vide* Cholmondeley *v.* Clinton, 2 Mer. 259.

(c) Doe *v.* Maisey, *supra.*

by the agreement for quiet possession until default, &c. (*d*), and he has no right to emblements, for all the produce of the land forms part of the security (*e*).

His possession, generally speaking, being only that of tenant at will or at sufferance, he cannot make a lease to bind the mortgagee; and if he make such a lease, the mortgagee may proceed to eject the lessee without notice (*f*). If the land, however, at the time of the mortgage, be in the occupation of a tenant from year to year, he will be entitled to the usual notice to quit (*g*).

On the eviction of the lessee two questions arise: First, whether he is entitled to *emblements*, and secondly, whether he is liable to an action for *mesne profits*.

First, as to emblements: the point was started in the case of Keech *v.* Hall, but did not call for a decision, the court only remarking that the right to emblements would be no bar to the mortgagee's recovering in ejectment; it would only give the lessee a right of ingress and egress to take the crops. It may, however, be considered, that both on legal and equitable principles the lessee will not be entitled to emblements, for at law he is evicted by title para-

(*d*) Keech *v.* Hall, Dougl. 22.
(*e*) *Ibid.*; and see Doe *v.* Maisey, *supra*. (*f*) *Ibid.*
(*g*) Birch *v.* Wright, 7 Term Rep. 383.

mount, and the law makes a distinction as to the right to emblements, between tenants who have particular estates that are uncertain, defeasible by the act of the parties to the original contract, or by the act of God, and those who have particular estates defeasible by a *right paramount*, for in the latter case (*h*) he that hath the right paramount shall have the emblements, for although *quoad actionem* the law will not by a fiction make the lessee who comes in by title liable to punishment as a trespasser, yet *quoad proprietatem*, the regress of the disseisee revests the property as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself. For the rule and reason of the law is, that after the regress of the disseisee, the law adjudges that the freehold has continued in him; which rule and reason extends as well to the emblements as to the freehold, and although the act of the disseisor may alter a man's action, yet his act cannot take away his action, property, or right (*i*).

Nor if the tenancy determines by the act of the lessee, will he be entitled to emblements (*k*), and therefore it was decided that if a lease be granted subject to a condition of re-entry on bankruptcy, insolvency, or by the lessee incurring a debt on which judgment shall be entered up, and the lessor re-enter for condition broken, the latter will have a right to the emblements (*l*).

(*h*) Co. Litt. 55, (*b*).
(*i*) Lifford's case, 11 Co. 51.
(*k*) Bulwer v. Bulwer, 2 B. & A. 470.
(*l*) Davis v. Eyton, 7 Bingham, 154.

As to mesne profits, the legal remedy is by an action of trespass *vi et armis*, and in this respect, a distinction is taken between a disseisor and one who comes in under him by title (*l*), for if a man be disseised, and the disseisor, during the disseisin, cuts down the trees, or grass, or the corn growing upon the land, and afterwards the disseisee re-enters, the disseisee shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c., for after the regress, the law, as to the disseisor and his servants, supposes the freehold always continued in the disseisee. But if the disseisor makes a feoffment in fee, gift in tail, lease for life or years, and afterwards the disseisee re-enters, he shall not have trespass *vi et armis* against those who come in by title, for this fiction of the law, that the freehold continued always in the disseisee shall not have relation to make him who comes in by a title a wrong-doer *vi et armis*, because in *fictione juris semper æquitas existit.* But in such case, the disseisee shall recover all the mesne profits against the disseisor. Now it might be thought that the lessee who came in under the mortgagor in possession was within the rule, and consequently not liable to an action for mesne profits. But in the case of Pope *v.* Biggs (*m*) the judges of the Court of King's Bench held a contrary opinion, and that the lessee *is* liable to such an action on ejectment by the mortgagee for rents due at the time when notice of the mortgage was given, and not then paid over to the mortgagor.

(*l*) Lifford's case, *ubi supra.*

(*m*) 9 Barn. & Cres. 245.

The mortgagor not being able by himself to make a valid lease, it follows that, in order to enforce specific performance of an agreement for a lease, he must obtain a prior re-conveyance from the mortgagee, or procure the latter to concur in the lease (*n*).

In Costigan *v.* Hastler (*o*), it seems to have been considered that the tenant could not under an agreement for a lease, compel the mortgagor to redeem for the purpose of granting a valid lease, but the circumstances of that case were very special; the rent reserved was a rack rent; and, pending the suit, performance of the contract became impossible, the premises being sold by the mortgagee under an order of Court. The circumstances in that case were, that John Parker, being seised in fee of the equity of redemption of some lands in mortgage, entered into an agreement to grant a lease to one Alley in trust for Hastler. The latter got into possession, and advertised the lands to be let. The plaintiffs offered a rent of 22*l.*, and were declared the tenants. A lease for three lives was prepared by Hastler, from Alley to the plaintiffs, and executed by the latter, but not by Alley, and was retained by Hastler, under pretence of procuring Alley's signature. The plaintiff entered into possession of part of the premises. Hastler subsequently distrained for rent. To prevent a sale of the distress, the plaintiffs gave three notes of hand to a trustee for Hastler, subject to a settlement of accounts; on which notes, but without a settlement of accounts, actions were

(*n*) *Vide* Costigan v. Hastler, 2 Sch. & Lef. 160.
(*o*) *Vide* 2 Sch. & Lef. 160.

brought by Hastler. The original bill was filed by the plaintiffs for relief, praying that the notes of hand might be cancelled, and Alley be obliged to execute the lease. After the filing of the bill, the mortgagee obtained a decree for sale, and the plaintiffs were put out of possession; on which they amended their bill, and prayed that they might be restored to the possession, or Hastler should be ordered to pay them the value of their interest in the lands, which had considerably risen in value. The decree was, that the contract for the lease should be set aside, and the plaintiffs should account for the rent due on such part of the lands of which they had possession during the period of their occupation, and the Master should set a fair rent on those lands, and ascertain the amount due at the time of the distress; and it was ordered that the proceedings on the notes of hand should be staid, and the actions discontinued, and the notes brought into court.

The mortgagee, as before stated, may annul the lease, or he may confirm the tenancy (*o*); and any act of the mortgagee, demonstrating an approbation of the demise, such as the receipt of or distress for rent, or the like, will be evidence of confirmation. If the mortgagee encourages the lessee to lay out money on the premises, he will not afterwards be permitted to disavow the tenancy (*p*); and even if he proceeds to evict the lessee, yet the lease, being a valid demise of the equity of redemption, will entitle the lessee to redeem the mortgage (*q*), and will at all events be

(*o*) Keech *v.* Hall, *supra.* (*p*) *Vide* Dougl. 22. (*q*) *Vide infra.*

inding on the mortgagor and all persons claiming nder him.

The mortgagor cannot dispute his mortgagee's itle against his own solemn act (*r*), nor could he, uring the existence of fines and recoveries, have arred the mortgagee's title by such mode of assurance (*s*). And if prior to the statute of the 3 & 4 Vill. IV. cap. 74, abolishing fines and recoveries, he mortgagor, being tenant in tail, had mortgaged is estate, and afterwards levied a fine, or suffered a ecovery to other uses, it would, nevertheless, have et in the mortgage (*t*); and since the passing of the tatute, the mortgage of tenant in tail will be also et in by his deed duly enrolled in pursuance of the tatute, except as against a *bonâ fide* purchaser without express notice (*u*).

If a mortgagor parts with his whole interest in the and, and (having consequently an equity of redemption only) joins with his mortgagee in a lease of the remises, and the lessee enters into covenants with he mortgagor and his assigns, these covenants, eing collateral to the land, will neither descend at ommon law to the heir of the mortgagor, nor pass o an assignee of the mortgagee under the statute 32 Hen. VIII. (*x*), but will be covenants in gross, on vhich actions must be brought in the name of the

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(*r*) Cowper, 601.

(*s*) 1 Vent. 82; 1 Lev. 272; Hard. 402; Noy, 25; Fermor's case, 3 Co. 77; Sid. 460; Carth. 101; 2 Ves. 482; Hall v. Surtees, 5 B. & Ald. 687. (*t*) *Vide suprà.*

(*u*) See 3 & 4 Will. 4, c. 74, s. 38; *et vide suprà*, pp. 214, 215.

(*x*) Cap. 34.

mortgagor or his personal representives (*y*). In the case of Webb *v.* Russell, Stokes being possessed of a term of ninety-nine years, assigned to Webb by way of mortgage. Stokes and Webb joined in a demise to Russell for eleven years, at a rent of 300*l.*, payable to Stokes or his assigns; and Russell covenanted with Stokes and his assigns, to pay the rent and keep the premises in repair. Stokes afterwards purchased the reversion in fee, which was conveyed to Thackery, in trust for Webb, subject to redemption by Stokes. Webb died, and appointed the plaintiff his executrix; and afterwards Thackeray conveyed the reversion to the plaintiff; so that, at law, both the term of ninety-nine years and the inheritance became vested in the plaintiff; and consequently, the former merged in the latter. The plaintiff brought her action for breach of covenant in non-payment of rent and want of repair. The action was defended on two grounds, first, that the term of ninety-nine years being extinguished, the assignee of the reversion on the term of eleven years was not seised of the same estate in respect of which the covenants were made, and secondly, that the covenants entered into with the mortgagor, who had no estate in the land, were collateral and in gross, there being no privity of estate between the parties. Both objections were allowed by the Court to be fatal to the action. Lord Kenyon, in delivering judgment, stated, that, at common law, covenants which run with the land pass to the person to whom the lands

(*y*) Webb v. Russell, 3 Term Rep. 393.

descend; the statute gave the grantee of the reversion the like advantages against the lessee as the grantor had, and gave the lessee the like remedies against the grantee, as he might have had against the grantor. Therefore the inquiry in this case was whether this action could have been maintained by the heir of Stokes, which was not the case, because there was no privity of estate which was necessary to make the covenants run with the land; and he fully admitted, that if they had run with the land, and had been entered into with Webb, yet the assignee could not have maintained the action, for the reversion of the term to which the covenants were incident was extinguished in the reversion in fee.

After this decision, an action was brought against Russell for breach of covenants in the name of Stokes the mortgagor, and the court was clear the action would lie (*z*).

On the like principle as that on which the Court of King's Bench decided the first point in Webb *v.* Russell against the plaintiff, viz. the alteration of the estate in reversion, the Court of Common Pleas lately decided that if a lessor having only an equitable title makes a demise, and subsequently takes a reconveyance of the legal estate, his assignee of the reversion cannot sue the lessee on the covenants in the lease (*a*). And if a mortgagor after grant-

(*z*) Stokes *v.* Russell, 3 Term Rep. 678.

(*a*) Whitton *v.* Peacock, 2 Bingh. New Cases, 411.

ing a lease convey away his estate by way of mortgage, it will be a good defence for the tenant in an action of ejectment against him by the lessor to shew the fact of such conveyance, because although a tenant cannot deny his landlord's title, yet he may shew it has determined since the granting of the lease (*b*).

A right of entry in a lease cannot be reserved to a stranger, and, therefore, if it appears on the face of the lease that the legal estate is in the mortgagee or a trustee for him, and the right of entry is reserved to the mortgagor, it will be void (*c*).

(*b*) Marriott *v.* Edwards and others, 5 B. & Ad. 1065.
(*c*) Doe *v.* Lawrence, 4 Taunt. 23.

CHAPTER IV.

OF THE PRIVILEGES ANNEXED TO THE ESTATE OF THE MORTGAGEE.

THE mortgagee by virtue of his mortgage becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent if the land be in lease. And it seems that equity will in no case interfere to prevent the mortgagee from pursuing his legal remedy to obtain possession (*a*). It is a privilege annexed to his estate as before mentioned (*b*), that he may evict the mortgagor without notice or demand of possession (*c*), and retain the emblements, and if the lease be granted subsequently to the mortgage without his concurrence, he may also evict the lessee of the mortgagor without notice, and retain the emblements, and may have an action for mesne profits (*d*).

In the case of Pope *v.* Biggs (*e*) the Court of King's Bench decided, that the tenant in possession under a demise *subsequent* to the mortgage, was justified in paying the rent to the mortgagee, due at the time of the notice, on the ground that as the mortgagee might have evicted the tenant, and obtained

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(*a*) *Vide* 2 Mer. 259; Williams *v.* Medlicott, 6 Price, 496.
(*b*) *Supra*, p. 406.
(*c*) Doe *v.* Maisey, *supra*; and Doe *v.* Giles, 5 Bingh. 421.
(*d*) *Supra*, p. 408. (*e*) 9 Barn. & Cress. 245.

the rents due in an action for mesne profits, the mortgagee must be entitled to receive them, without bringing an ejectment. A question (*f*) has been raised whether if the tenant should refuse to pay the rents due at the time of the notice, the mortgagee could recover them *quà* rents. The case of Pope *v.* Biggs could not decide that question, as it was an action brought by the assignees of the *mortgagor* against the tenant, to recover rents paid by the tenant to the mortgagee, and not an action brought by the mortgagee to recover the rents from the tenant. But from the reasoning of the Court it may be thought that the rents due at the time of the notice, on a demise subsequent to the mortgage, cannot be recovered by the mortgagee *quà* rents, and that if the tenant refuses to pay him, the mortgagee must evict the tenant, and bring his action for mesne profits, on the principle of there having been no privity of estate between the mortgagee and the tenant prior to the notice.

If the demise is *prior* to the mortgage, the notice of the mortgagee to the tenant in possession operates as an attornment at common law, having relation back to the time of the grant, and it follows that all the rents due from the tenant at the time of the notice, and not actually paid over to the mortgagor (*g*), belong of right to the mortgagee, who may distrain

(*f*) In the Law Magazine for November 1836, an able article will be found on the respective rights of mortgagee and mortgagor for recovery of rents.

(*g*) See 4 Ann. c. 16, s. 9, 10.

for them (*h*), or if the tenant holds from year to year, may recover them in an action for use and occupation (*i*).

In any legal proceeding against the tenant subsequent to the notice, he may show his lessor's title to have determined (*k*), and therefore the proceedings should be in the name of the mortgagee.

To enable a mortgagee to distrain on the *mortgagor* in possession, an agreement to that effect should be inserted in the mortgage deed, and a sum certain be stated by way of rent (*l*).

A further privilege annexed to the mortgagee's estate forms an exception to the general rule of equity, that a party suing at law shall not be allowed to sue in equity at the same time; for a mortgagee may at the same time proceed by action at law on his bond and covenant, and by bill in equity for a foreclosure (*m*); and he may take the body of the debtor in execution, and still be entitled to the benefit of his security (*n*). But the mortgagor shall not be compelled to make payment on the bond, unless the mortgagee is in a condition to re-convey the estate, and deliver up the title, and therefore in a

(*h*) Moss *v.* Gallimore, 1 Doug. 279.

(*i*) Birch *v.* Wright, 1 T. R. 378.

(*k*) See Marriott *v.* Edwards and others, *supra.*

(*l*) See 5 Nev. & Man. 511.

(*m*) Burnell *v.* Martin, Dougl. 417; Schoole *v.* Sall, 1 Sch. & Lef. 176.

(*n*) Davis *v.* Battine, 2 Russ. and Mylne, 76.

case (*o*) in which the mortgagee having died without any heir who could be discovered (*p*), the executor was restrained by a court of equity from proceeding at law to compel payment of the money, which was ordered to be paid into court until the heir could be found; and in another case (*q*), in which the title deeds had been lodged by the mortgagee with an attorney who claimed a lien on them, the Court granted an injunction against the proceedings at law, and ordered the money to be paid into the bank, until the title deeds were secured, and a re-conveyance could be had. And in another case (*r*), an injunction was granted restraining mortgagees of a West India estate from proceeding by bill of foreclosure in a colonial court, after a decree for an account on bill filed in England to redeem; all the parties being in England.

The mortgagee is entitled out of the profits of the estate to repay himself all his necessary expenses attending the collection of the rents (*s*), and he may stipulate with the mortgagor for the appointment of a receiver, to be paid by the latter (*t*), he may also if the property lies dispersed, or at a distance, or is so circumstanced that the mortgagee must, if the property had been his own, have appointed a bailiff

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(*o*) Cited in Schoole *v.* Sall, *supra.*

(*p*) As to this now, *vide* 1 Will. IV. c. 60, s. 8; 4 & 5 Geo. IV. c. 23; *Ex parte* Goddard; *Ex parte* Stanley, *supra; Ex parte* Whitton, 1 Keen, 278.

(*q*) Schoole *v.* Sall, *supra.*

(*r*) Beckford *v.* Kemble, 1 Simons & Stuart, 7.

(*s*) 3 Atk. 518. (*t*) Chambers *v.* Goldwin, 9 Ves. jun. 271

or receiver to manage it and collect the rents, appoint a bailiff or receiver of the rents without the authority of the mortgagor (*u*). It is, however, clearly settled, that the mortgagee shall not be allowed to make any charge for his personal trouble(*x*), nor appoint himself the receiver, even under an express agreement for that purpose with the mortgagor (*y*), for he is entitled to no benefit beyond his principal, interest and costs, besides that such an agreement might subject the mortgagor to imposition, and tend to usury.

Much discussion has arisen on the question to what extent a mortgagee of a West India estate may charge commission. The result of the different cases appears to be, that whilst he is mortgagee out of possession, he may stipulate for the consignments of the produce, and charge commission on the net produce as a compensation for his trouble (*z*). But when he is in possession, he stands in precisely the same situation as a mortgagee in possession in England; and consequently, although, if he employ another person as consignee, commission may be charged; yet if he chooses to be consignee himself, he has no commission (*a*).

(*u*) Bonithon *v.* Hockmore, 1 Vern. 316; Godfrey *v.* Watson, 3 Atk. 518; Davis *v.* Denby, 3 Madd. 170.

(*x*) Godfrey *v.* Watson, *supra;* Langstaffe *v.* Fenwick, 10 Ves. 405.

(*y*) French *v.* Baron, 2 Atk. 120.

(*z*) Bunbury *v.* Winter, 1 Jac. & Walk. 255.

(*a*) Leith *v.* Irvine, 1 Myl. & Keen, 277; Chambers *v.* Goldwin, 9 Ves. 271; *et vide* Forrest *v.* Elwes, 2 Mer. 68.

It is the duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed the charge of permanent improvements with interest from the time of advancing the loans (*b*). In like manner he will be entitled to all his expenses attending the renewal of leases (*c*), or in maintaining the title (*d*). And to prevent forfeiture for waste, he may pull down ruinous houses, and build others on their scite (*e*), and if the security be defective, he may fell timber and sell it, and apply the produce in liquidation of his debt, and will not be enjoined in equity (*f*). But a mortgagee is not bound to lay out money on the estate, except for necessary repairs (*g*), nor can he, on the other hand, compel the mortgagor to advance money for the renewal of leases without an express agreement between them to that effect (*h*).

It is a further privilege of a mortgagee, that if he has been in possession for a term of seven years previously to the time of election, he may be qualified to sit in parliament, although the equity of redemption continues in another party (*i*).

If in possession, he may gain a settlement under

(*b*) *Vide* the Decree in Webb *v.* Rorke, *infra*, and Godfrey *v.* Watson, *supra*.

(*c*) Lucam *v.* Mertins, 1 Wils. 34; Manlove *v.* Bale, 2 Vern. 84.

(*d*) Godfrey *v.* Watson, *supra*.

(*e*) Hardy *v.* Reeves, 4 Ves. jun. 480.

(*f*) Witherington v. Banks, Sel. Ca. Ch. 31.

(*g*) 3 Atk. 518. (*h*) Manlove *v.* Ball, *supra*.

(*i*) *Vide* 9 Ann. c. 5; 41 Geo. III. c. 101; 59 Geo. III. c. 37.

the poor laws (*k*), and will be entitled to vote for a return of members to parliament (*l*).

He is not estopped from denying his mortgagor's title (*m*). He is also a purchaser *pro tanto* within the 27 Eliz. cap. 4, so as to avoid a prior voluntary settlement under that act (*n*).

Although the mortgagee is bound to account to the mortgagor for the rents, even so far, that if, after taking possession, he assigns over to another, without the consent of the mortgagor (*o*), he remains liable to the account, yet he is not obliged to account according to the *actual value* of the land, nor bound by any proof that the land is worth so much, unless it can be proved that he made so much of it, or might have done without his own wilful default, as if he turned out a sufficient tenant who held it at so much rent, or refused to accept a sufficient tenant who would have given so much for it (*p*), because it is the laches of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money; therefore when the mort-

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(*k*) Rex *v.* Inhabitants of Catherington, 3 Term Rep. 771; *sed vide* 4 & 5 Will. IV. c. 68, as to residence within ten miles.

(*l*) 2 & 3 Will. IV. c. 45, s. 23. Note.—On this clause much difference of opinion has arisen as to the meaning of the legislature in introducing the word "trustee." See Proceedings in Courts of Revision in the Isle of Wight, before James Manning, Esq. page 186.

(*m*) Cordinglee *v.* England, 3 Keb. 712, 54.

(*n*) Chapman *v.* Emery, Cowp. 278; White *v.* Hussey, Prec. Ch. 13.

(*o*) 1 Eq. Ca. Ab. 327.

(*p*) Anon. 1 Vern. 45; 1 Eq. Ca. Ab. 327.

gagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property. Nor can he be compelled by a purchaser to quit the possession without payment of principal, interest, and full costs (*q*).

On redemption also he is entitled to his full costs, unless deprived of them by his own misconduct (*r*.)

It is laid down as clear law, without contradiction, that a mortgagor in possession, by levying a fine, could not bar the mortgagee by non-claim. This rule necessarily flowed from the nature of their estates, and as well from the tenancy as from the trust and confidence between them. The cases at common law decided that a fine levied by tenant for years, or at will, was as against the lessor and his heirs fraudulent and void (*s*), and the same doctrine is directly applied to the case of mortgagor and mortgagee (*t*). An actual entry, therefore, was not necessary to avoid such a fine, and even if the fine were a bar at common law, it would be void in equity (*u*) from the confidence between the parties.

By the 7th Anne, c. 19, (since repealed,) reciting that many inconveniences arose by reason that per-

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(*q*) Davy *v.* Barker, 2 Atk. 2.

(*r*) Lomax *v.* Hide, 2 Vern. 185; Detellin *v.* Gale, 7 Ves. jun. 588, *et vide infra,*

(*s*) Fermor's case, 3 Co. 77; Focus *v.* Salisbury, Hard. 400.

(*t*) Freeman *v.* Banes, Vent. 82; 1 Lev. 272; Focus *v.* Salisbury, *supra;* Smith *v.* Pearce, Carth. 101.

(*u*) 2 Ves. 482; Hall *v.* Surtees, *supra.*

sons under the age of 21 years, having estates in lands, and only in trust for others, or by way of mortgage, could not convey any sure estate in such lands to any other person or persons, it was enacted, that it should be lawful for any such infants, by the direction of the Court of Chancery, or the Court of Exchequer, signified by an order made upon the hearing of all parties concerned, on the petition of the persons for whom such infants should be seised in trust, or of the mortgagors or guardians of such infants, or persons entitled to the monies secured by or upon any lands, &c., whereof any infants were or should be seised or possessed by way of mortgage, or of the persons entitled to the redemption thereof, to convey and assure any such lands, &c., in such manner as the Court of Chancery or the Court of Exchequer should, by such order so to be obtained, direct, to any other persons, and such conveyance or assurance, so to be had or made, should be as good and effectual in law, to all intents and purposes whatsoever, as if the infants were, at the time of making such conveyance or assurance, of the full age of one and twenty years, and that all such infants, being only trustees or mortgagees as aforesaid, should and might be compelled by such order, so as aforesaid to be obtained, to make such conveyances or assurances as aforesaid, in like manner as trustees or mortgagees of full age were compellable to convey or assign their trust estates or mortgages.

It was held that this statute did not extend to trusts by implication of law (*x*), nor to any case in

(*x*) Goodwin *v.* Lister, 3 Peere Williams, 387.

which there were trusts to be performed requiring a discretion on the part of the infant. But it was thought by some, that if all the parties beneficially interested under the trusts, being adults and free from disabilities, would petition for a conveyance to their nominee, the Court might treat the infant as a mortgagee or trustee within the statute. In the case of Ex parte Chasteney (*y*) however, where the infant was a trustee for sale, the Master of the Rolls refused to make an order, although all the *cestuis que trust* were consenting parties. It will be seen that provision has been since made for this omission in the statute.

The statute of Anne gave rise to some discussion, as well in the consideration of cases in which the infant mortgagee had an interest in the monies secured by the mortgage, as in cases in which from the circumstances of the cases, it was requisite to have resort to a fine or recovery.

In the case of Zouch *v.* Parsons (*z*), a mortgagee in fee had died leaving an infant heir, and by his will had appointed his widow and the infant his co-executors and residuary legatees. On the mortgage being paid off, the infant and the widow had, without the sanction of a Court of Equity, by lease and release, granted and conveyed the mortgaged premises to certain other mortgagees in fee. The infant during his minority entered to avoid his own conveyance. The Court of King's Bench expressed a decided opinion that the infant was within the statute of the 7th of Anne, and consequently would on proper application have been compellable to convey.

(*y*) 1 Jacob, 56. (*z*) 3 Burr. 1794.

The court also held, that the conveyance being *for the benefit* of the infant was *voidable* only, but that he could not during his minority elect to avoid, nor could any one else make the election for him. In reference to this decision, Lord Eldon observed (*a*), that though it was true that where an infant conveyed as a trustee within the statute, *not being so*, he would not be bound by his conveyance under such an order, yet if it was a case in which he would be bound to convey when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having a right to elect for him, whether it should be void or not, he would, when he became adult, be placed in such a situation, that if he sought at law to avoid his deed, a Court of Equity would prevent him. The result seemed to be, that if an order for the conveyance by the infant was made by the court, it was not very material, (admitting the infant to be so circumstanced, that if of age he might on bill and answer be compelled to convey as a trustee) whether the case be strictly within the scope of the act or not, for the conveyance would at law be voidable only after the infant became adult, and then, if he attempted to avoid the conveyance, equity would restrain him, and grant a perpetual injunction.

The decision in Zouch *v.* Parsons, that a conveyance by lease and release by an infant, if for his benefit, was *voidable* only, and not *void*, did not, however, meet the general approbation of the profession. The court in that case approved the distinction taken

(*a*) —— *v.* Handcock, 17 Ves. jun. 884.

by Perkins, section 12, that such grants, gifts, and deeds of an infant, as did not take effect by delivery of hand were *void*, and those which did were *voidable*, and it was thought that this rule should have prevailed in Zouch *v.* Parsons, and consequently that to render a conveyance by an infant *voidable* only, it should be effected by feoffment with personal livery of seisin (*b*).

Questions on the statute arose in cases in which the infant heir was interested in the monies, either as executor, legatee, or next of kin.

In *Ex parte* Sergison (*c*), an infant heir was also *sole executor*. The Master of the Rolls considered that he could not order him to convey, because, as executor, the infant was entitled to receive the money which he could not permit an infant executor to do; and he thought they must file a bill. On a petition to the Lord Chancellor, the money was ordered to be paid into the Bank, and the Master's report confirmed, declaring the infant was not a mortgagee or trustee within the act. The circumstances of this case, it is said (*d*), had considerable effect in producing the act of parliament 38 Geo. III. c. 87, ss. 6 and 7, reciting that inconveniences arise from granting probate to infants under the age of twenty-one, and enacting that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to

(*b*) *Et vide* 3 Burr. 1803. Note by the late Mr. Serjeant Hill. (2 Preston's Convey. 249.)

(*c*) Ves. jun. 147. (*d*) Note to *ex parte* Sergison.

such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years; at which period, and not before, probate of the will shall be granted to him; such administrator to have the same powers as an administrator *durante minore ætate* of the next of kin.

In Zouch *v.* Parsons, the infant was, as before noticed, a *co-executor*, and it being a maxim of law, that one of several executors may alone give a valid discharge for a debt due to the estate, the mortgage money might have been paid to the adult executor alone. On this reasoning, the court of King's Bench certainly grounded their opinion in Zouch *v.* Parsons, that the infant was in that case within the act. In *Ex parte* Marshall (*f*), the infant was one of four residuary legatees, but not executor. The Master reported he was not a mere trustee within the act, but the Master of the Rolls was of a different opinion, and ordered him to convey. In another case (*g*), the infant was one of the next of kin, and Lord Thurlow ordered him to convey, because the money would be paid to the administrator. In a more recent case (*h*), the question arose on an objection to title; the infant being a co-executor, and one of the residuary legatees. Lord Eldon gave his opinion that payment to the other executor made the infant a trustee within the statute, and ordered him to convey. On the authority of these cases it appeared to result, that if there was a hand

(*f*) 17 Ves. jun. 333, note.
(*g*) 17 Ves. jun. 383, note.
(*h*) —— *v.* Handcock, 17 Ves. jun. 383.

authorized by law to receive the money, the infant would have been ordered to convey, although he was one of several executors, or beneficially interested, and that after the passing of the 38 Geo. III. cap. 87, the case of *Ex parte* Sergison was no longer applicable in cases in which the infant heir is also sole executor.

The operation of the statute was not confined to England, infants having been ordered to convey lands in the West Indies (*i*), at Calcutta (*k*), and in Ireland (*l*).

It was doubted by Lord Hardwicke, whether the judges would permit an infant trustee under the statute of Anne to suffer a common recovery, unless he procured a privy seal from that purpose (*m*); but in a subsequent case (*n*), his lordship, on considering the wording of the act, ordered an infant trustee, being a tenant in tail, to convey by common recovery (*o*). If the infant were a feme covert, she might have conveyed by fine (*p*). The Court would also, if necessary, have directed the infant to make a surrender of copyhold estates (*q*).

(*i*) *Ex parte* Prosser, 2 B. C. C. 325; *Ex parte* Bosanquet; *Ex parte* Fenelito; *Ex parte* Osborne. All cited in 5 Ves. jun. 242.

(*k*) *Ex parte* Anderson, 5 Ves. jun. 242.

(*l*) Evelyn *v.* Forster, 8 Ves. jun. 96.

(*m*) *Ex parte* Bowes, 9 Atk. 164.

(*n*) *Ex parte* Johnson, *ibid.* 558.

(*o*) *Et vide Ex parte* Smith, Amb. 624.

(*p*) *Ex parte* Maire, 3 Atk. 479; Anon. Com. 615.

(*q*) *Vide* 7 Term. Rep. 104.

Such was the state of the law prior to the passing of the 6 Geo. IV. cap. 74, which repealed the stat. of Anne, and authorized infant trustees and mortgagees to convey by direction of the Court of Chancery or Exchequer, or if the lands were situate within the duchy of Lancaster, or the counties palatine of Chester, Lancaster, or Durham, or principality of Wales, then by direction of the Court of the Duchy Chamber of Lancaster, the Court of Exchequer of the County Palatine of Chester, the Court of Chancery of the County Palatine of Lancaster, the Court of Chancery of the County Palatine of Durham, and the several courts of Great Session in Wales. And by the fifth section of this act it was provided, as often as any person seised of any lands upon any trusts, *or by way of mortgage*, should be out of the jurisdiction, or not amenable to the process of the Court of Chancery or Exchequer, or it should be unknown or uncertain whether he was living or dead, or such person should refuse to convey such lands to the person entitled thereto, or as he should direct, or to a trustee duly appointed by some power, or by the Court of Chancery or Exchequer, in every such case it should be lawful for the Court of Chancery or Exchequer to appoint such person or persons as to such court should seem meet, "on behalf and in the name of the person seised or possessed as aforesaid, to convey, surrender, or assign such lands to such person or persons, or in such manner as the Court should direct." And it was provided, that every order of the Court in pursuance of the act might be made upon petition.

By the tenth section of the act the provisions contained in it were extended to cases in which the trustee might have some beneficial estate in the land, or some duties to perform, *so as* to enable conveyances to be made in order to vest any land in a new trustee or trustees duly appointed in the place of such trustee, by virtue of some power, or by the Court of Chancery or Exchequer. It will be observed, that this last section did not extend to trusts by implication, but left the law in that respect as it was under the statute of Anne.

By an act passed in the 7th of Geo. IV. the provisions made by the fifth and tenth sections of 6 Geo. IV. were extended to Ireland (*r*).

In the 1st of Will. IV. (*s*) an act was passed for amending the laws respecting conveyances of estates vested in trustees and mortgagees, by which the prior statutes of the 4 Geo. IV. and 7 Geo. IV. were repealed.

By this statute it was enacted, that it should be lawful for any infant trustee or mortgagee to convey, by the direction of the Court of Chancery, in such manner as the Court should think proper. And that every infant trustee or mortgagee of lands within the duchy of Lancaster or the counties palatine of Chester, Lancashire, and Durham, or principality of Wales, might convey, by direction of the Court of the Duchy Chamber of Lancaster, the Court of Exchequer in the county palatine of Chester, the

(*r*) 7 Geo. IV. cap. 43. (*s*) 1 Will. IV. cap. 60.

ourt of Chancery in the counties palatine of Lanaster and Durham, and several courts of Great ession in Wales, in such manner as such courts hould direct, in like manner as such infant was ereinbefore empowered to convey the same by the irection of the court of Chancery.

The statute received the royal assent on the 23d f July, 1830, on which day another statute also reeived the royal assent (*t*), by which the jurisdicf the Court of Exchequer in the county palatine of hester, and of the courts of Great Session in Wales, as determined; and so far therefore as affects nds in those places, the last-mentioned provision as rendered inoperative at the moment of making , and the jurisdiction of the Court of Chancery was lone applicable to them.

By the eighth section of the 1 Will. IV. cap. 60, the ower given by the 6 Geo. IV. to the court to appoint person to convey in the place of a trustee or mortagee, is in terms restricted to the case of a trustee, he words "by way of mortgage" being omitted. ut the provision of the statute was extended to the ase of the trustee being dead *and his heir not being nown*, and the provision of the prior act in respect f his refusal to execute a conveyance was altered, o as to embrace his heir so refusing, and a period f twenty-eight days was given for such refusal or eglect after tender.

(*t*) 1 Will. IV. cap. 70.

The provision contained in the 6 Geo. IV., directing the orders to be made upon petition, was repeated with some slight variations. But the Lord Chancellor was by a new clause authorized, if he thought fit, to direct a bill to be filed to establish the right of the party seeking a conveyance.

Persons having a beneficial estate, or a duty to perform, were declared to be trustees within the act; but a power was in this respect also given to the Lord Chancellor in every case (except that of a naked trustee) to direct a bill to be filed for establishing the rights of parties claiming a conveyance.

The most material alteration made by this act, however, had reference to trusts *by implication*. Thus it was declared, that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have departed this life, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either wholly, or as far as the same remains to be executed, or as far as the same, by reason of the infancy, can be executed, shall have been decreed by the Court of Chancery in the lifetime of such vendor, or after his decease, and where one person shall have purchased an estate in the name of another, but the nominal purchaser shall, on the face of the conveyance, appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the said court, either before or after the death of such nominal pur-

chaser, shall have declared such nominal purchaser to be a trustee for the real purchaser, then and in every such case the heir of such vendor, or such nominal purchaser or his heir, in whom the premises shall be vested, shall be, and be deemed to be, a trustee for the purchaser within the meaning of the act.

And further, that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have departed this life, having devised the same in settlement, so as to be vested in any person for life, or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court of Chancery, it shall be lawful for the Court by whom such decree shall be made, by the same or any other decree, or any decretal order, or upon petition in the cause, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee simple, or other the whole estate contracted to be sold, to the purchaser, or in such manner as the court shall think proper; and every such conveyance shall be as effectual as if the person who shall make the same were seised of the fee simple, or other the whole estate contracted to be sold.

And that the several provisions thereinbefore con-

tained, shall extend to *every other case of a constructive trust, or trust arising or resulting by implication of law;* but in every such case where the alleged trustee has, or claims, a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee, until after it has been declared by the Court of Chancery, in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer; but the act is not to extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case thereinbefore expressly provided for.

The Vice Chancellor has decided (*t*) that this last section does not apply to any case to which the eighth section does not apply, and therefore that the devisee of a mortgagee refusing to convey was not within the act.

The statute further enacts, that where any feme covert would be a trustee, mortgagee, heir, or executor within the provisions of the act, if she were an infant or lunatic, or out of the jurisdiction, or not amenable to the process of the Court of Chancery or Exchequer, or had refused or neglected, as aforesaid, to execute or make such conveyance, transfer, receipt or payment as thereinbefore mentioned, and the concurrence of her husband shall be necessary in any conveyance, transfer, receipt, or payment which ought to be made or executed by her as

(*t*) *Ex parte* Payne, 6 Simons, 645.

such trustee, mortgagee, heir, or executor; then and in any such case, such husband, whether under any disability or not, shall be, and be deemed to be, a trustee within the meaning of the act.

It has been already noticed (*u*), that a question arose under this act, whether the power of the court to appoint a person to convey extended to the case of a *mortgagee* dying intestate as to real estate and his heir not being known, and it was decided it did not (*x*), but was confined to the case of *a trustee*. In a subsequent case, however, heard before the present Master of the Rolls, a contrary decree has been pronounced (*y*).

The act having omitted to provide for the case of there being no heir, as well as of his not being known, another statute was passed in the 4 & 5 Will. IV. (*z*) which provides, that where any person seised of land upon trust, or by way of mortgage, shall die without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey *in like manner* as was provided by the 1 Will. IV. in case such trustee or mortgagee had left an heir and it was not known who was such heir, and such conveyance shall be as effectual as if there was such heir.

It will be seen that the last enactment in respect of the heir of a mortgagee proceeded on the supposition that the case of a mortgagee dying and his

(*u*) *Supra.*

(*x*) Re Goddard, 1 Myl. & Keene, 25; Re Stanley, 5 Sim. 821.

(*y*) *Ex parte* Whitton, 1 Keen, 279. (*z*) 4 & 5 Will. IV. c. 23.

heir not being known, was within the 1 Will. IV. And upon such construction of the statute the Master of the Rolls decided the case of *Ex parte* Whitton (z), in opposition to the judgments in the cases of Re Goddard and Re Stanley.

The 4 & 5 Will. IV. contains several other enactments which are of great importance and very beneficial to the public. It provides, that no land, chattels, or stock vested in any person upon any trust, or by way of mortgage, or any profits thereof, shall escheat or be forfeited to the king, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee or survivee to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place.

But a clause is added, providing that nothing in the act contained shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee or mortgagee, so far as relates to any beneficial interest of such trustee or mortgagee therein; but that such land, chattels or stock, so far as relates to such beneficial interest shall be recoverable in the same manner as if the act had not passed.

The act, lastly, provides for the case of escheats and forfeitures already incurred before the passing of the statute, and in such respect enacts, that in all cases where before the passing of the act any per-

(z) *Supra.*

son possessed of or entitled to any land, chattels or stock, as *a trustee* thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of an offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then in every or any such case the said land, chattels or stock, or the right thereto or interest therein, which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control, and disposition of the Court of Chancery, for the use of the party beneficially interested therein, in such manner, and subject in all respects to such rights and incidents, and to such orders and regulations of the said court, under the provisions of an act passed in the eleventh year of King George IV. and of the first year of King William IV. as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of, or not amenable to the process of the said court, without having been so convicted. But that nothing therein contained should extend to any land, chattels or stock then vested in any person by virtue of any grant thereof, made subsequently to the *time* when such *escheat* or *forfeiture* first occurred, or to any land, chattels or stock which more than twenty years prior to the passing of that act, should have been actually vested in possession, or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture.

Inconveniencies having also arisen from the consequences of mortgages passing into the hands

of *idiots and lunatics*, the legislature provided by an act passed in the 4 Geo. II (*y*), that it should be lawful for any person being idiot, lunatic, or *non compos mentis*, or for the committee or committees of such person in his or her name, by the direction of the Lord Chancellor, or Lord Keeper, or Lords Commissioners of the Great Seal, by an order made upon hearing all parties concerned on the petition of the person, for whom such person being idiot, lunatic, or *non compos mentis*, should be seised in trust, or of the mortgagor or person entitled to the monies secured upon any lands whereof any such person being idiot, lunatic, or *non compos mentis*, was seised or possessed by way of mortgage, or of the person entitled to the redemption thereof, to convey and assure any such lands in such manner as the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, should by such order so to be obtained direct, to any other person, and such conveyance or assurance so to be had and made, should be as good and effectual in law, to all intents and purposes, as if the person being idiot, lunatic, or *non compos*, was at the time of the making of such conveyance or assurance, of sane mind, memory, or understanding, and not idiot, lunatic, or *non compos mentis*, or had by him or herself executed the same. And that every such person being idiot, lunatic, or *non compos mentis*, and only trustee or mortgagee as aforesaid, or the committee of every such person, might be empowered and compelled by such order so to be obtained, to make such conveyance or assurance, in like manner as trustees or mortgagees

(*y*) 4 Geo. II. cap. 10.

of sane memory were compellable to convey or assign their trust estates or mortgages.

On this statute it was decided, that a lunatic trustee or mortgagee could not be ordered to convey unless a commission of lunacy had previously issued, or unless he had been found lunatic by a competent jurisdiction abroad (*z*).

The act 4 Geo. II. cap. 10, was repealed by the 6 Geo. IV. cap. 74, and by the latter statute it was enacted, that when any persons seised of any land upon any trust or by way of mortgage shall be lunatic, it shall be lawful for the committee of such person or persons to be appointed as thereinafter mentioned in the name of such person being idiot, &c., by direction of the Lord Chancellor, Lord Keeper, or Lord Commissioner, to convey or surrender, &c.; and, in order to obviate the difficulties created by the decisions before referred to, it was provided, that if such person had not been found idiot by inquisition, it should be lawful for the Lord Chancellor to appoint any person on behalf of such idiot to convey.

The 1 Will. IV. cap. 60 (which repealed the 6 Geo. IV.) contains provisions similar to those last-before mentioned, and directs that every order shall be made upon petition.

The 13th section of this act makes it compulsory on any committee, infant, or other person directed by the act to convey, to make and execute such conveyance.

(*z*) *Ex parte* Otto Lewis, 1 Ves. 298; *Ex parte* Gillam, 2 Ves. 587; *et vide Ex parte* Marchioness of Annandale, Amb. 80.

CHAPTER V.

OF THE RESTRICTIONS AND DISABILITIES ANNEXED TO THE ESTATE OF THE MORTGAGEE.

EQUITY having extended its protection to the estate of the mortgagor, and decided that until foreclosure, the mortgage (although in fee) is but a security for the debt, will not permit the mortgagee to take an undue advantage of the necessities of the mortgagor, or of the legal incidents accruing at common law to the estate of the mortgagee in the land. It has therefore imposed some considerable restrictions and even disabilities on the mortgagee, so long as he retains that character.

Amongst the latter may be reckoned his inability to accept a valid lease from the mortgagor, even, as it should seem, at a fair rent. The authority for this position is a case heard in Ireland before Lord Redesdale (*a*). The facts were, Edward Webb mortgaged to Rorke, and some years afterwards granted a lease of part of the land to Rorke for a term of 999 years, at a yearly rent. A bill was filed by the heirs of Webb, against the heirs and executors of Rorke, charging that the lease was made at a gross under-value, and in consequence of threats of foreclosure, and prayed that the lease and mortgage

(*a*) Webb *v.* Rorke, 2 Sch. & Lef. 661.

deed might be brought into court, and the defendant might account for the real value of the lands. The answer insisted that the lands were let at a fair value and without threat. Two issues at law were directed, first, whether the lease was voluntarily granted, and secondly, whether the rent reserved was a fair rent. The jury found in the affirmative on both issues. On the cause coming on to be heard in equity, Lord Redesdale considered he was mistaken in directing the issues at law, and decreed the lease to be set aside as contrary to the principles of public policy, and the spirit of the laws for the prevention of usurious contracts, and ordered the master to take an account of principal and interest, and as the rent did not appear fraudulent, he was to charge the defendant with such rent up to the first day of payment after filing the bill, and inquire whether the mortgagee had advanced any sums of money in permanent improvements of the land, and if so, to add the same to the mortgage debt, and calculate interest thereon.

The case of Webb *v.* Rorke had been preceded by a case heard also before Lord Redesdale (*b*), in which a lease from a mortgagor to a mortgagee had been set aside, but in that case there were circumstances of oppression and fraud, and consequently it is not an authority for a general rule; but the case of Webb *v.* Rorke was free from such circumstances, and consequently if it is to stand as law, establishes the principle, that if a mortgagee accepts

(*b*) Gubbins *v.* Creed, 2 Sch. & Lef. 214.

a lease from the mortgagor, he takes it subject to its being set aside in equity, however fair may be its provisions.

A further considerable disability annexed to his estate is, that although he is at law the actual owner, and consequently can make a good legal title, yet he cannot in equity make a valid or binding lease, unless it seems there be an absolute necessity for it. This was decided in a case (*c*) in which a mortgagor having filed his bill for a re-conveyance, the mortgagee answered that he had made a lease of the premises for five years, at a yearly rent, with a covenant that after the expiration of the five years, the lessee might hold it for four years longer, and that if the mortgagor would grant such additional lease, he would re-convey. This case being heard at the Rolls, a decree was obtained for the defendant, but on appeal, Lord Macclesfield was of opinion, that the mortgagee, before foreclosure of the equity, could not lease the premises for years to bind the mortgagor unless to avoid an apparent loss, and merely on necessity, and thereupon he reversed the decree at the Rolls.

The Courts of Equity, fearful of opening a door to fraud and usury, have imposed a restriction on the mortgagee that he shall not be permitted to make any charge on the estate for his personal trouble (*d*), or appoint himself receiver of the estate (*e*), although

(*c*) Hungerford *v.* Clay, 9 Mod. 1.
(*d*) *Supra*, 419. (*e*) *Ibid.*

under an express agreement with the mortgagor for that purpose. It has been already explained that the mortgagee of a West India estate, when in possession, cannot charge commission as consignee (*f*). In a case at common law (*g*) it appeared, that a mortgage deed contained a proviso that in order the better to secure the more regular and punctual payment of the interest of the mortgage monies, the mortgagee should be in the receipt of the rents of the premises, (which were messuages in the county of Middlesex,) and should be allowed as receiver 40*l.* a year for his trouble, and after retention thereof and of the interest, should pay the residue to the mortgagor. An action *qui tam* was brought against the mortgagee for usury, and a verdict obtained by the plaintiff, subject to the opinion of the court, whether the action was properly laid in London, the rent being received in Middlesex, but accounted for in London, where the contract was made. The court held, that the usury was not complete until the settlement of the account which took place in London, and therefore the venue was well laid.

The legislature has also imposed restrictions on the mortgagee as well in respect to his right of voting for the return of members to parliament as to his privilege of being elected. The 2 & 3 Will. IV. (*h*) enacts that no person shall be allowed to have any vote in the election of a knight or knights of the shire, for or by reason of any trust estate or

(*f*) *Vide supra*, p. 419.
(*g*) Scott *v.* Brest, 2 Term Rep. 238.
(*h*) 2 & 3 Will. IV. c. 45, s. 23.

mortgage, unless such trustee or mortgagee be *in actual possession* or receipt of the rents and profits of the same estate, and the 9 of Anne, c. 5, provides, that no person shall be qualified to sit in the House of Commons within the meaning of the act, by virtue of any mortgage whereof the equity of redemption is in any other persons, unless the mortgagee shall have been in possession of the mortgaged premises *for seven years* before the time of his election (*i*).

A mortgagee in possession being considered by equity in some sort as a trustee of the estate, and as such accountable for the rents and profits, it behoves him to be very careful to whom he assigns his mortgage unless with the concurrence of the mortgagor, for if he assign to an insolvent person, he will be liable to account for the rents as well after as before the assignment (*k*), for it is a breach of trust in him to assign the pledge to a person insolvent.

In a modern case (*l*), an estate being already in mortgage was devised in strict settlement; the mortgagee permitted the tenant for life in possession to run the interest in arrear, and afterwards purchased the estate for life, and entered into possession and received the rents for about three years, when the tenant for life died. The plaintiff filed his bill of foreclosure against the remainder-man; and the only question which arose was, whether in taking the

(*i*) *Vide supra*, p. 420.
(*k*) 1 Equ. Ca. Ab. 327.
(*l*) Lord Penrhyn *v.* Hughes, 5 Ves. jun. 99.

accounts, the plaintiff was to be charged not only for the interest accrued since his taking possession, but also with the arrears due at the time of his purchase, the defendant insisting that the surplus rents received by him after deducting the current interest ought to be applied in reduction of the arrears. The point was admitted to be new—for the plaintiff it was urged that to make good the defendant's claim, it must rest on the ground of lien for the arrears, which did not subsist between the tenant for life and remainder-man. For the defendant it was urged that the tenant for life was bound to keep down the interest, and the mortgagee having notice of that equity, purchased subject to it. The Master of the Rolls held, that inasmuch as, if the mortgagee had entered in that capacity, the surplus rents must have been applied in discharge of the arrears, he should not be allowed to prejudice the rights of the reversioner by entering as a purchaser. The decree was, that an account should be taken of principal, interest, and costs, and of the rents and profits received by the plaintiff, which were to be applied, first in payment of the interest, which accrued due subsequently to his entering into possession, and in the next place, so far as they would extend, in satisfaction of the preceding arrears.

In an earlier case (*m*) a term was created for raising portions out of annual profits. The mortgagee permitted the tenant for life to enjoy the estate under the usual clause, that it should be lawful for

(*m*) Ivy v. Gilbert, 2 P. Wms. 20.

the mortgagor to take the profits until default: the Court held, that the rents being received by the tenant for life, with the permission of the mortgagee, it was the same as if the mortgagee had let the estate to any other person, and therefore the profits received by the tenant for life with the mortgagee's permission, should be considered as if received by the mortgagee himself, and be accounted for accordingly, and that he might have his remedy over against the personal representatives of the tenant for life.

On the like principle of trusteeship, equity holds, that if leaseholds be in mortgage, and the mortgagee renew, he will take the renewed lease, subject to the like equity as was subsisting in the old lease, even although there was only what is called a tenant right of renewal (*n*); and if an advowson be in mortgage, and the living become vacant, the mortgagor and not the mortgagee shall present (*o*), nor will equity permit the mortgagor to agree to the contrary (*p*), for the mortgagee shall have no benefit beyond his principal, interest, and costs.

If the mortgagee present, and his clerk be admitted, the mortgagor may, by bill in equity, compel him to resign, but the bill must be filed within six months after the death of the last incumbent (*q*).

(*n*) *Supra*, p. 147.

(*o*) *Supra*, p. 62.

(*p*) *Supra*, p. 21.

(*q*) Gardiner *v.* Griffith, 2 P. Wms. 404; *supra*.

A further restriction on the estate of the mortgagee is, that he shall not be permitted (if in possession) to waste the estate (*r*); if he proceed to fell timber, an account will be decreed and the produce applied, first, in payment of the interest, and then in sinking the principal, and equity will enjoin him, unless the security prove defective, in which case the Court will not restrain him from felling timber, the produce being of course applied in ease of the estate (*s*).

It may be almost superfluous to notice, that the mortgagee must take the estate subject to the acts of forfeiture, &c., committed by the mortgagor. If an authority for the position be requisite, the following (*t*) is in point:—an estate had, on marriage, been limited in strict settlement on the husband *for life*, with remainder to the wife for life, with remainder to their first and other sons in tail male. The husband concealed the settlement, and with his wife conveyed to a mortgagee in fee by lease and release *and fine sur conuzance, &c.* which was a forfeiture of their life estates. The mortgage was afterwards transferred to the plaintiff, and for further assurance a second conveyance and fine were executed and levied by the husband and wife. The husband died. The plaintiff filed his bill of fore-

(*r*) Hanson *v.* Derby, 2 Vern. 392.

(*s*) Witherington *v.* Bankes, Sel. Ca. Ch. 31.

(*t*) Lady Whetstone *v.* Sainsbury, Pre. Ch. 591; *sed vide* Willis *v.* Fineux, *ibid.* 108.

closure against the wife and eldest son, and to be relieved against the forfeiture. The son pleaded the settlement and insisted on the forfeiture by the fine, and the court allowed the plea: but it ultimately appearing that the estates were *equitable* only, the Court held the fine to be no forfeiture, and ordered that the mortgagee should hold during the widow's life (*u*).

It is a restriction also on the estate of the mortgagee, that he cannot compel the mortgagor to account for the past rents and profits. This matter has been already treated of (*x*); and in addition to the preceding remarks may be here noticed a case (*y*), the circumstances of which were, that a term of one hundred years, created to raise childrens' portions, had been assigned by the trustees by way of mortgage; the money was permitted to remain on the estate for many years. Under certain proceedings in Chancery distinct from the mortgage, a receiver had been appointed, and the surplus rents paid into court. Part of the money was due when the term expired by effluxion of time; the mortgagee applied to the Court to be paid the remaining debt out of the fund in Court, but without success. And in a subsequent case, in which a receiver had been appointed in a suit in which the mortgagee was not a party, the latter applied for the rents paid into court, on the ground that he was legally entitled to them. But his pe-

(*u*) 2 P. Wms. 146. (*x*) *Supra.*

(*y*) Gresley *v.* Adderley, 1 Swanst. 573.

tition was dismissed, although he had given notice to the tenants to pay him the rents, which by reason of the appointment of the receiver was disregarded. The Court held, that his notice to the tenants could not devest the possession of the receiver, which was in fact the possession of those claiming under the *mortgagor*, and that for the purpose of devesting the possession of the receiver an application to the Court was necessary, which, it appeared, the mortgagee had some months before actually made, and had then obtained his removal. The petition was for the rents accrued between the time of the appointment of the receiver and his discharge. Against the decision, the mortgagee appealed to the Lord Chancellor, who dismissed the appeal with costs(*z*).

(*z*) Thomas *v.* Brigstocke, 4 Russ. 64.

BOOK THE FOURTH.

CHAPTER I.

OF NOTICE.

THE doctrine of notice so materially affects the remaining part of our subject, that it will be requisite to direct our attention to it before we proceed farther in our inquiry.

Notice is express or implied; to which may be added, a third sort of notice, *viz.* notice by statutory enactment, which does not come within either of the first mentioned species; for express notice is an actual knowledge of a given fact, regularly and formally communicated; and implied notice is a conclusion of law from violent presumption, which the courts will not allow to be controverted: but the third species arises neither from actual knowledge nor from legal presumption, but, on the contrary, would not be classed within either of those species, and is therefore made notice by legislative enactment.

If a party having notice convey for a valuable consideration to one who has not notice, or if a party

not having notice convey to one who has notice, the party taking the conveyance will not, in either case, be affected by the notice; for, in the first instance, he may defend himself by his want of notice (*a*), and, in the second instance, by the want of notice in the party through whom he claims (*b*). And therefore, if *A.*, having notice, sells to *B.*, who has not notice, who sells to *C.*, who has notice, *B.* is protected against the notice in *A.* by his own want of notice and *C.* is defended by the want of notice in *B.* (*c*).

It is however laid down in Bacon's Abridgment (*d*), on the authority of a case in Vernon (*e*), that if one take a mortgage by assignment from a mortgagee affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better title than he has himself; and if such original mortgagee, in a bill filed by the person setting up an eigne title against the mortgagee and his assignee, and praying to be let into possession, and charging notice, confess by his answer that he had notice before the lending of the money, that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must

(*a*) Mertins *v.* Joliffe, Amb. 313; Ferrars *v.* Cherry, 2 Vern. 384.

(*b*) Harrison *v.* Forth, Pre. Ch. 51; 1 Eq. Ca. Ab. 331; Sweet *v.* Southcote, 2 B. C. C. 66; Andrew v. Wrigley, 4 B. C. C. 125; M'Queen *v.* Farquhar, 11 Ves. jun. 478.

(*c*) Lowther *v.* Calton, 2 Atk. 139; Bradwell *v.* Catchpole, 3 Swans. 78, note.

(*d*) 5 Vol. 76. (*e*) Walley *v.* Walley, 1 Vern. 484.

stand in his assignor's place, and his assignor's confession of notice will bind him. In this doctrine Mr. Powell acquiesces (*f*), and in support of it cites the case of Lord Pomfret *v.* Lord Windsor (*g*), in which an estate which was vested in trustees for raising a specific sum, was afterwards mortgaged with notice of that charge, and then a subsequent mortgage was made to one who had notice of the prior mortgage, but not of the antecedent charge, the Court held, the last mortgagee must take subject to the first charge. It is, however, submitted, that the case is not in point; for as the legal estate was outstanding, all the charges were alike equitable, and the question of notice did not, in fact, arise, and the reasoning of the Court on the point of notice, (so far as it went,) proceeded on a very different ground, viz. that as the persons having the equitable charge had a right to compel the first mortgagee who had notice of it to redeem them, then the first mortgagee, obtaining the legal estate from the trustees, would have a right to compel the second mortgagee to redeem both charges, or be foreclosed. Of this there could be no question; but to have rendered the case applicable to the point under discussion, the second mortgagee should have obtained an actual conveyance of the legal estate from the first mortgagee, and then, having the legal estate to protect himself, and having equal equity with the prior equitable incumbrancer, the question would have been fairly raised, whether, standing in the place of the first mortgagee

(*f*) Powell on Mortgages, vol. ii. 601, 4th edit.
(*g*) 2 Ves. 185.

quoad the legal estate, he was bound by the notice which his assignor had. To have decided this question in the affirmative, would apparently have been in contradiction to the well-known equitable maxim, that, where equities are equal, the legal estate shall prevail, on which the doctrine of tacking, hereafter discussed, is chiefly grounded, and in opposition to many well-considered cases in which that doctrine has been applied.

A doubt, however, of a somewhat similar nature is said to have been thrown out by Lord Eldon in the case of Mackreth *v.* Symmons (*h*) before alluded to. In that case, Lord Eldon is reported to have put this question, whether there was any case in which a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second. His lordship remarked, when the case of Maundrell *v.* Maundrell (*i*) was before him, he looked for, but could not find such a case, viz. that where there was bad faith on the part of the first mortgagee, that equity was applied. It is reported, that Sir Samuel Romilly, answered, he did not believe that was ever decided, and there would be great difficulty in deciding it in favor of the third mortgagee, who puts himself in the place of the first. We shall, however, hereafter see, that a third mortgagee is allowed to tack *pendente lite*, even after a bill filed by a second mortgagee against the first and third mortgagees; and in which con-

(*h*) 15 Ves. jun. 335. (*i*) 10 Ves. jun. 246.

sequently, the first mortgagee must have had notice of the second mortgage at the time of the assignment. The precise point, however, has been lately argued before the present Lord Chancellor, when Master of the Rolls, who decided that the notice given by the second mortgagee to the first mortgagee did not prevent the third mortgagee who lent his money without notice from tacking (*i*).

If there be fraud in the original creation of the mortgage, as, for example, if no money actually pass between the parties, and if the mortgagee afterwards assign to a third person for a valuable consideration, without notice of the fraud in the original transaction, and the mortgagor convey his equitable interest to a stranger for a valuable consideration without notice of the mortgage, the money paid on the assignment will make good the original transaction and purge the fraud (*k*).

In reference to the doctrine of express notice, equity does not require a party to take notice of vague rumours proceeding from strangers to the estate (*l*); and it is expected that the notice shall be made with some degree of precision as to the nature of the supposed right, and not consist of a mere general and undefined claim (*m*); but whether the notice be express, or rest on rumour or on general claim, a purchaser or mortgagee can never be advised

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(*i*) Peacock *v.* Burt, see Appendix.

(*k*) Andrew Newport's case, Ca. *temp.* Holt, 477; Skin. 423.

(*l*) Wildgoose *v.* Wayland, Goulds. 147.

(*m*) Jolland *v.* Stainbridge, 3 Ves. jun. 478.

to disregard it, or to accept the title without an inquiry into the nature of the demand (*n*).

It is difficult to lay down general rules as to what will or will not be constructive notice; but it is an established principle, that whatever is sufficient to put a party upon an inquiry is good notice in equity (*o*). As for example, if a person is aware that the legal estate is in a third person, he is bound to take notice what the trust is (*p*), for it is his duty to make that inquiry of the trustees. On the same principle, it is held, that notice of the land being in tenancy is notice of the nature of the interest of the tenant in the land, as of a lease, although the purchaser or mortgagee considered the tenant to be tenant only from year to year (*q*), but it must be observed, that, if the lease be invalid, the point of notice cannot prevent an ejectment at law (*r*). A purchaser or mortgagee will be considered to have notice of a contract entered into by the tenant to become the purchaser of the freehold, although he had no intimation of the fact (*s*), and equity will en-

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(*n*) See Fry *v.* Porter, 1 Mod. 311; Butcher *v.* Stapeley, 1 Vern. 363.

(*o*) Smith *v.* Lowe, 1 Atk. 490; Anon. 2 Freem. 137, Pl. 171; Taylor *v.* Stibbert, 2 Ves. jun. 437; Willoughby *v.* Willoughby, 1 Term Rep. 769; Hall *v.* Smith, 14 Ves. 426; Hiern *v.* Mill, 13 Ves. 114; Daniels *v.* Davison, 16 Ves. 249; 17 Ves. 433.

(*p*) Anon. 2 Freem. 173; Pl. 171.

(*q*) 2 Ves. jun. 440; 13 Ves. 120; Hall *v.* Smith, 14 Ves. 426.

(*r*) Doe *v.* Lufkin, 4 East, 221.

(*s*) Daniels *v.* Davison, 16 Ves. 249; Crofton *v.* Ormsby, 2 Sch. & Lef. 583.

force specific performance against the vendor and second purchaser, and leave them to settle the question between themselves (*t*). The same doctrine has subsequently been applied to the tenant's right to the timber, although accruing by a title posterior to that on which his right to the possession was grounded (*u*). But if a lease be made of charity lands, which is set aside as improvident, it seems a *bona fide* purchaser of a sub-lease will not be supposed to have notice of that fact (*x*), which depends on a number of extraneous circumstances. Notice that the title-deeds are in the possession of a third person may, under the circumstances, be sufficient to set a purchaser upon inquiry, to ascertain what lien the party holding has on the estate (*y*).

It is immaterial whether the notice be given to the party himself, or to his counsel, attorney, or agent (*z*); and consequently, if the same attorney be employed by both parties, the purchaser, or mortgagee, will be affected by the knowledge obtained by the vendor's or mortgagor's solicitor (*a*), even although the sale was made under the direction of the Court of Chancery, and the purchase was made by trustees on behalf of an infant (*b*); but the notice must be *in re gestâ*, even in the case of one solicitor

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(*t*) 16 Ves. 249; 17 Ves. 433.

(*u*) Allen *v.* Anthony, 1 Mer. 282.

(*x*) Attorney General *v.* Backhouse, 17 Ves. jun. 283.

(*y*) Hiern *v.* Mill, *supra*.

(*z*) Le Neve *v.* Le Neve, 3 Atk. 646; Brotherton *v.* Hatt, 2 Ver. 574.

(*a*) Le Neve *v.* Le Neve, *supra*.

(*b*) Joulmin *v.* Steere, 3 Mer. 210.

being employed by both parties (*c*), unless the transactions are immediately consecutive (*d*).

In Sugden's Vendors and Purchasers (*e*), a case of constructive notice is put, in the instance of notice to the town agent of the country attorney of the purchaser or mortgagee, which, it is said, is notice to the principal; and for this, the case of Norris *v.* Le Neve, heard before Lord Hardwicke, is cited (*f*). There may be no question as to the doctrine; but the facts in that case are not exactly in point. It is rather an authority, that if the country attorney have notice of a fact, but employ a town agent to conduct the suit, the notice will attach to the parties, although the town agent be without actual notice. In the case in queston, Martin, the country attorney, had notice; but he swore that he was employed as attorney in the ejectment at law, which was tried in the country, and not as the solicitor in the suit in equity, which was conducted by his town agent. The Lord Chancellor declared he would consider him as solicitor notwithstanding he lived in the country, for every body knew that country attornies acted by agents in causes in town.

If the counsel, &c. having notice be employed in part only of the transaction, the purchaser will be equally affected (*g*).

(*c*) Mountford *v.* Scott, 3 Madd. 34; Turner & Russel, 274.

(*d*) Hargreaves *v.* Rothwell, 1 Keen, 154.

(*e*) Sugden's Vendors and Purchasers, 742, 8th ed.

(*f*) 6 Atk. 26.

(*g*) Bury *v.* Bury. See App. to Sugd. Vendors and Purchasers.

It is held, that if a party cannot make out his title except by a deed, which by recital refers to other facts or deeds, he will be considered conusant of such other facts or deeds (*g*), and if he has notice of a deed, he has notice of all its contents (*h*). In reference to which Lord Redesdale has taken the following distinctions (*i*):—If a man purchase an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchase the other lands to which an apparent title is made independent of that deed, the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase. But if a man agree to purchase under limitations in a deed, which make it necessary upon that transaction to look into that deed, and that deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments; for he had a right to see the whole deed under which he purchased, and, therefore, must be taken to have seen the whole, and consequently be presumed to have notice of every thing in it affecting his purchase. And in the same case his lordship carried the doctrine of notice so far as to hold that if *A.* seised of Whiteacre in fee, confesses judgments, and settles that estate in

(*g*) Hamilton *v.* Royce, 2 Sch. & Lef. 315.

(*h*) *Ibid. et vide* Coppin *v.* Fernyhough, 2 B. C. C. 291.

(*i*) 2 Sch. & Lef. 327.

consideration of a conveyance to him of Blackacre in fee, on which Blackacre in equity becomes liable to indemnify Whiteacre against the judgments, a purchaser of Blackacre, with notice of deeds which recite the judgments, will be bound by the equity. On this latter doctrine it has been remarked (*k*), that it carries the rule much further, it is apprehended, than is warranted either by principle or authority. But it seems to follow as a corollary from the rules laid down, that the purchaser of Blackacre must be bound by the equitable lien arising from facts stated in deeds of which he had express notice.

On the like principle it seems that if a husband who has not performed his part of marriage articles assign his wife's fortune, which was the consideration for the proposed settlement by him, the purchaser (with notice of the contract) will be bound by the same equity as the husband was (*l*); the consequence of which is, that if the husband take the wife's estate under a settlement, and it is noticed in the conveyance to the husband that it is made in consideration of a provision to be made by him, a purchaser or mortgagee must inquire into the nature of the provision, and whether it has been completed (*m*).

If an appointment be made by a father under a power to appoint the estate to one or more of his

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(*k*) Sugden's Vendors and Purchasers, 757, 8th edit.

(*l*) Harvey *v.* Ashley, cited in 2 Sch. & Lef. 328.

(*m*) *Et vide* Mitford *v.* Mitford, 9 Ves. jun. 87.

children, to one of his sons in fee, and a conveyance be afterwards executed by father and son in consideration of a sum of money stated in the purchase-deed to be paid to both, although the contract was entered into by the father alone before the appointment to the son, the purchaser will not be affected with notice of fraud in the absence of all evidence to shew that the son was not to receive a due proportion of the purchase money (*n*); to the application of which the purchaser is not bound to look.

The registration of a deed is not of itself notice (*o*); and, consequently, if, subsequently to an assignment of mortgage which is registered, payments are made by the mortgagor to the mortgagee without notice of the assignment, they must in account be allowed by the assignee (*p*); and if a mortgagee, having the legal estate, under a deed duly registered, make further advances, he will, in England, have preference over an intermediate incumbrancer or purchaser, of whose title he has not notice, although the intermediate deed of sale or charge be duly registered (*q*); and if a subsequent mortgagee obtain the legal estate, he will, in England, have preference over a prior equitable incumbrancer duly registered, of which he had not notice (*r*). This latter position was much ani-

(*n*) M'Queen *v.* Farquhar, 11 Ves. jun. 467; 17 Ves. jun. 293.

(*o*) Bedford *v.* Backhouse, 2 Eq. Ca. Ab. 615, Pl. 12; Wrighton *v.* Hudson, 2 Eq. Ca. Ab. 609; Williams *v.* Sorrell, 4 Ves. 389; Wiseman *v.* Westland, 1 Y. & J. 117.

(*p*) Williams *v.* Sorrell, *supra.*

(*q*) Bedford *v.* Backhouse; Wrightson *v.* Hudson, *supra.*

(*r*) Morecock *v.* Dickens, Amb. 678.

madverted upon and questioned by Sir Edward Sugden in an early edition of his treatise on Vendors and Purchasers (*s*); it being there considered as hardly reconcileable with the general principles of equity, and as tending to perjury. Besides it was urged, that the prior mortgagee has no means of acquainting the subsequent incumbrancer with his charge, but the latter has it in his power to ascertain whether the estate is incumbered, and, therefore, it is his own neglect not to ascertain that there was a prior charge. To these observations it was replied, that, as to the general principles of equity, the rule is inflexible, that, where equities are equal, the legal estate shall prevail; and that equity has made no distinction between cases in which the legal estate is vested in a purchaser or incumbrancer prior or subsequent to the other conveyance; the simple question being, whether the equities are equal, for, if so, the rule must prevail; and it being decided, that registration of itself is not notice in cases in which the legal estate is, previously to making the subsequent charge, vested in the mortgagee, it would follow that the legal estate must be a protection, although subsequently acquired. The objection, that this doctrine tends to perjury, applies strongly to both cases; for it is a great temptation to a party having the legal estate, and making further advances, to deny notice, although he has searched the register. As to the remark, that one party has it in his power to ascertain whether the estate is incumbered, but the other party cannot give express notice of his charge; it might be replied, that it is the

(*s*) Sugden's Vendors and Purchasers, 608, 5th edit.

folly of a purchaser or mortgagee to advance his money without having previously ascertained whether the legal estate be outstanding or not; and if the legal estate is shewn to be outstanding, it is his business to get it in, or give proper notice of his incumbrance. If he neglect so to do, he takes the consequences: — *Vigilantibus non dormientibus jura subveniunt.* In the principal case under discussion, Morecock had been guilty of gross negligence, almost amounting to fraud, in allowing the mortgagor to retain the possession of a lease which he afterwards delivered up to Dickens; so that, independent of Dickens's legal right, Morecock had no claim to the assistance of equity. In the subsequent editions of the treatise, the parts alluded to are omitted; from which it may be inferred, the author is satisfied with the correctness of the decision.

The reasoning of Lord Redesdale, on the consequences of a contrary doctrine, is forcible and decisive. The question before him was (*s*), whether marriage articles, duly registered, amounted to notice. After remarking the difference between the Registry Acts of England and the Registry Act of Ireland (*t*), the latter of which declares that every deed shall be effectual *according to the priority of time of registering the memorial,* and stating that he thought the registry was not notice, but had, nevertheless, the effect of giving priority, except in the case of fraud, as when the party has notice *aliunde;* he remarked, "It is true, the registry is considered

(*s*) Bushell v. Bushell, 1 Sch. & Lef. 103. (*t*) 6 Ann. c. 2.

as notice to a certain extent; no person thinks of purchasing an estate without searching the registry; and, if he searches, he has notice; but I think it cannot be notice to all intents, on account of the mischiefs that would arise from such a decision. For if it is to be taken as constructive notice, it must be taken as notice of every thing that is contained in the memorial; if a memorial contains a recital of another instrument, it is notice of that instrument; if of a fact, it is notice of that fact." His lordship ultimately determined the plaintiffs were entitled to have the benefit of the articles against persons claiming by virtue of a subsequent legal settlement, under the peculiar wording of the act. In a subsequent case (*u*), in which he decided that the Irish Registry Act would not permit tacking, he observed, "That the registry is to be considered as notice to all intents and purposes, is, I think, what one would not be inclined to hold when one sees the effect of so considering it; if it is to be considered as notice, because it is an intimation of the existence of a deed put upon record, it must be notice of every thing in that deed, for a party would be bound to inquire after the contents of that deed; if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered; and if it be so, the act does not give a preference: and thus this construction would avoid all the provisions in the act for complying with its requisites." And in another case (*x*), he observed, "that it seemed to him

(*u*) Latouche *v.* Lord Dunsany, 1 Sch. & Lef. 157.

(*x*) Underwood *v.* Lord Courtown, 2 Sch. & Lef. 64.

that nothing could be more mischievous than to hold that the putting any thing on the registry is notice within the meaning of the word notice as applied to Courts of Equity in such cases."

It may be proper in this place to make a few observations tending more particularly to distinguish between the operation of the registry acts of England and Ireland; and with that view it may be first remarked, that the two sets of acts in the following respects agree, viz. that registry itself is not notice (*y*), that deeds take effect *inter partes* and their representatives although not registered, for the registry acts do not make registration imperative, but leave it at the option of the parties, and that notice of a prior unregistered deed will prevent the priority of a subsequent registered deed (*z*). But as between two registered deeds for good consideration without notice, this difference exists, viz. that in England a registered deed conveying the *legal estate* will have preference over a prior registered equitable conveyance, if such subsequent conveyance was obtained without notice of the prior equitable assurance. But in Ireland, by force of the peculiar wording of the fourth section of the act 6 Anne, c. 2, s. 3 (*a*), a prior registered deed, although

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(*y*) As to England, *vide infra*, p. 460; as to Ireland, see Bushell *v.* Bushell, 1 Sch. & Lef. 103; Latouche *v.* Dunsany, *ibid.* 157; Underwood *v.* Lord Courtoun, 2 Sch. & Lef. 64; and Pentland *v.* Stokes, 2 Ball & Beatty, 68.

(*z*) As to Ireland, see Underwood *v.* Courtoun, *supra*; Biddulph *v.* St. John, 2 Sch. & Lef. 521.

(*a*) 1 Sch. & Lef. 98.

only a charge (*b*), and even articles of agreement, will have preference to a subsequent deed, although it be a conveyance of the legal estate without notice. This difference in the operation of the two statutes has equal effect, when applied to the equitable doctrine of tacking, as hereafter noticed.

In the case of Warburton *v.* Loveland (*c*), a woman possessed of a term of years expectant on her father's death, joined with her father in *an assignment* of it to trustees by way of settlement on her intended marriage, and the trusts were declared for the father for life, with remainder for the intended husband for life, with remainder for the wife for life, with remainder over. This deed was *not* registered. On the death of the father the husband entered, and made a grant for a long term of years. This deed *was* registered. The lessee assigned to another. This deed was *not* registered. The husband died. The wife entered, and the assign of the husband's lease brought ejectment. It was decided by the House of Lords, on appeal, that the grant by the husband had preference to the settlement, although the wife had actually parted with the term before the marriage, on the ground that he must have appeared to the world as holding under the original lease, and not under the unregistered settlement, and that the assign of the husband's lease (although claiming under an unregistered deed) had also preference to the unregistered settlement.

(*b*) Bushell *v.* Bushell, *supra.* (*c*) 6 Bligh, 1.

On this case the judges in Ireland had widely differed in opinion, and it was one of much difficulty, the husband never having had legal possession of the term.

Judgments do not require to be registered under the Irish registry acts, but have preference according to their date of entry over all subsequent deeds although registered, and even, as it seems, over all unregistered deeds, although prior in date.

But on this latter point there is in the books a difference of opinion between the authorities, Lord Chancellor Plunkett having held, that such priority should only be given for the purpose of consistency, in the event of the judgment standing between a prior unregistered deed and a subsequent registered deed, in which case the judgment must have preference to both, as otherwise there would be the absurdity of the judgment having preference to the registered deed, but not to the prior unregistered deed; whilst the subsequent registered deed would have preference to the prior unregistered deed (*d*). And the Lord Chief Baron O'Grady holding that, according to the Irish Registry Act, the judgment was to have preference to every unregistered deed, without reference to the fact of there being a subsequent registered deed (*e*).

It is decided, that a registered deed shall not prevail against an unregistered deed, of which the party

(*d*) Latouche *v.* Lord Dunsany, 1 Sch. & Lef. 161.

(*e*) D'Arcy *v.* Chambers, *ibid.* 468.

registering had notice. The cases are clear on this point (*f*), and, indeed, result from the principle on which the law of notice itself is founded. It has, however, been justly remarked (*g*), that in this case the statute must have operation at law, so as to vest the estate in the subsequent purchaser, but subject to the relief which will be granted in equity.

An act of bankruptcy is not notice (*h*). But by the 6 Geo. IV. cap. 16 (*i*), it was enacted, that the issuing of a commission should be deemed notice of a prior act of bankruptcy, if the adjudication of such bankruptcy had been notified in the London Gazette, and the person to be affected by the notice might reasonably be presumed to have seen the same. By the 1 & 2 Will. IV, cap. 56, sec. 16, the laws and statutes then in force relating to commissions were extended to fiats issued under the latter act.

The docketing of judgments is not of itself notice (*k*); on the other hand, if a party have notice of a judgment not duly docketed, he will in equity be bound by it (*l*).

(*f*) Lord Forbes *v.* Deniston, 1 Ves. 67; 2 B. P. C. 425; Blades *v.* Blades, 1 Eq. Ca. Ab. 358; Hine *v.* Dodd, 2 Atk. 275; Le Neve *v.* Le Neve, 3 Atk. 652; Bushell *v.* Bushell, *supra;* Biddulph *v.* St. John, 2 Sch. & Lef. 521.

(*g*) Sugden's Vendors and Purchasers, 707, 8th edit.

(*h*) Collett *v.* De Gols, Fort. 70; Wilkes *v.* Bodington, 2 Vern. 599.

(*i*) Section 83.

(*k*) 2 Eq. Ca. Ab. 682, note.

(*l*) Davis *v.* Earl of Strathmore, 16 Ves. 419.

A decree is not constructive notice after the determination of the suit, to persons not parties to it (*m*). But a purchaser *pendente lite*, although for a valuable consideration, and without notice, will be bound by the decree (*n*), if there has been a close and continued prosecution of the suit (*o*). He will be also bound by an interlocutory decree, or decree to account (*p*).

In a case heard before Lord Chancellor Cowper (*q*), it was decided, that if a first mortgagee be a witness to the second mortgage deed, it is sufficient notice to bind him, although it does not appear that he actually knew the contents; on the ground, that since it did not appear but that he might have known them, it would be presumed that every witness who could write or read was acquainted with the substance of the deed or instrument which he, having attested, undertook to support by his evidence. To this the reporter adds a quære, whether the bare attesting a subsequent incumbrance without other circumstances of presumptive notice, will postpone a prior incumbrance; since at that rate, he adds, a prior mortgagee or incumbrancer may, without any fraud or ill intention on his part, be liable to

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(*m*) Worsley *v.* Earl of Scarborough, 3 Atk. 392.

(*n*) Worsley *v.* Earl of Scarborough, *supra*; Sorrel *v.* Carpenter, 2 P. Wms. 482; Walker *v.* Smallwood, Amb. 676; *et vide* Herbert's case, 3 P. Wms. 116; Garth *v.* Ward, 2 Atk. 175.

(*o*) Preston *v.* Tubbin, 1 Vern. 286.

(*p*) Worsley *v.* Earl of Scarborough, *supra*.

(*q*) Mocatta *v.* Murgatroyd, 1 P. Wms. 393.

e cheated out of his security. *And so I find it said y Lord King in our author's report of an anonymous ase in Mich.* 1732." The learned editor also, in a ote, admits that none of the cases seem to come up o this point: and Lord Thurlow, in Becket *v.* Cordey (*r*), intimated, that he should have decided differntly; for a witness, in practice, is not privy to the ontents of the deed. The better opinion in the resent day appears to be, that the bare attestation f a deed will not, without other circumstances, be sufficient to bind a party with notice of its contents (*s*).

It is material to bear in mind, that a mortgagee btaining a conveyance of the legal estate, or other ecurity, subsequently to the date of his mortgage, will not be affected by an intermediate incumbrance, f he had not notice at the time of the completion of is mortgage, notwithstanding he may have notice in he intermediate time (*t*). On the other hand, the otice will be binding on him at any time prior to the ompletion of his mortgage (*u*), although, as it seems, e has advanced part or the whole of the money (*x*), r given a bond, &c. for the payment of it, and at

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(*r*) 1 B. C. C. 357.

(*s*) Fonb. Eq. vol. i. 165, 5th edit.; Sugden's Vendors and Purchasers, 759, 8th edit., and the cases there cited.

(*t*) See Wortley *v.* Birkhead, 2 Ves. 573; Peacock *v.* Burt, Appendix, *et vide supra*, 454.

(*u*) Tourville *v.* Naish, 3 P. Wms. 307; Story *v.* Lord Windsor, 2 Atk. 630; Hardingham *v.* Nichols, 3 Atk. 304.

(*x*) Tourville *v.* Naish, *supra*; Wigg *v.* Wigg, 1 Atk. 382, 3 P. Wms. 307, note; *et vide supra*, 239; *sed vide* Hill *v.* Bickersdike, 12 May, 1801, Exch. cited in 2 Fonb. 149, 5th edit.

law he would have no remedy in an action against him on the bond, but he would have relief in equity (*y*).

For the mode of pleading a purchase for a valuable consideration without notice as a bar to discovery or relief, the reader is referred to other works which treat on this subject (*z*).

If an estate is devised subject to debts and legacies, and a mortgagee has notice, from the nature of the transaction, that the money advanced by him is not to be applied in payment of debts, he will take subject to the charge of legacies (*a*).

(*y*) Tourville *v.* Naish, *supra.*

(*z*) Mitford on Pleading; Sugd. Vendors and Purchasers, &c.

(*a*) Watkins *v.* Cheek, 2 S. & S. 199; *et vide* Braithwaite *v.* Britain, 1 Keen, 215.

BOOK THE FIFTH.

CHAPTER I.

OF TACKING, AND PRIORITY OF INCUMBRANCES.

THE doctrine of tacking is founded on an application of the equitable maxims,—that he who seeks equity, shall do equity to the person from whom he requires it(*a*),—and where equities are equal, the law shall prevail (*b*).

It has been already remarked, that equity regards the debt as the principal—the land as the pledge; and although the land is absolutely forfeited at law, compels the mortgagee to permit his debtor to redeem; but, in so doing, it adheres to the first-mentioned rule, viz. he who seeks equity, shall do equity to him from whom he requires it; and, therefore, the Court will make terms with the debtor, before it will permit him to redeem, in order that full justice may be done to the creditor.

It is equity, that the debtor shall, before redemption, pay, not merely the principal and interest of the debt, but all costs necessarily incurred by the

(*a*) Francis's Maxims, 1. (*b*) *Ibid.* 14.

[illegible] in maintaining the title to the estate (*c*), [illegible] (*d*), making necessary repairs (*e*), or permanent improvements (*f*). And the Court will [illegible] interest on the sums from the time of their being advanced (*g*). The mortgagor on redemption must also pay the costs of all persons claiming under the mortgagor, although the mortgage be carried by the mortgagee into settlement (*h*): and the mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor (*i*), or to an incumbrancer under the will of the mortgagor, as a necessary party to foreclosure (*k*), and the costs of an action against a surety (*l*). If, however, the costs incurred are altogether irrelevant to the mortgage, they will not be allowed, as in the instance of the costs attending a deed executed by the mortgagee to a cestui que trust who lends him the money (*m*), and as in a case (*n*) in which a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for foreclosure, and also against the heir at law of the mortgagee for establishing the will, the Master of the Rolls ordered, that the plaintiff should pay

(*c*) Godfrey v. Watson, 3 Atk. 518.

(*d*) Lucam v. Mertins, 1 Wils. 34: Manlove v. Ball, 2 Vern. 84.

(*e*) Hardy v. Reeves, 4 Ves. jun. 480.

(*f*) *Vide* the Decree in Webb v. Rorke, *supra*; and Godfrey v. Watson, *supra*.

(*g*) Godfrey v. Watson, *supra*.

(*h*) Wetherell v. Collins, 3 Madd. 255.

(*i*) Ramsden v. Langley, 2 Vern. 536.

(*k*) Hunt v. Fownes, 9 Ves. jun. 70.

(*l*) Ellison v. Wright, 3 Russell, 458.

(*m*) Martin Demandant, 5 Bingham, 160.

(*n*) Skip v. Wyatt, 1 Cox, 353.

the heir of the mortgagee his costs, and that he should not be entitled to have them from the estate (*o*); nor will the mortgagee be allowed the costs of his petition for leave to bid at the sale of the mortgaged estate (*p*). A distinction will, of course, be drawn between the before-mentioned case, in which the concurrence of the heir at law of the mortgagee was necessary only to the establishment of the devisee's title, and the case of costs arising from the nature of the assurance required in the reconveyance of the mortgaged estate; as for example, if prior to the 3 & 4 Will. IV. cap. 74, a fine were necessary to divest the estate from a feme covert, or if an order of the Court of Chancery be required to procure a conveyance from an infant heir of the mortgagee (*q*), or if the mortgagor become insolvent and his assignees are made parties to the bill and disclaim all interest (*r*), in which cases the expenses must be ultimately borne by the mortgaged estate. But the costs of the committee of a lunatic mortgagee requisite to enable him to convey, including the order of reference under the statute, must be paid out of the lunatic's estate (*s*). If a mortgagee be guilty of gross misconduct, he will be refused costs (*t*), and even, under certain circumstances, be compelled to pay them (*u*).

(*o*) *Et vide* Wilson *v.* Metcalfe, 3 Madd. 45.

(*p*) *Ex parte* Williams, 1 Dea. & Chit. 489.

(*q*) *Ex parte* Cant, 10 Ves. 554.

(*r*) Woodward *v.* Hatton, 4 Simons, 606; Collins *v.* Shirley, 1 Russell & Mylne, 638.

(*s*) *Ex parte* Richards, 1 Jac. & Walk. 264.

(*t*) Mocatta *v.* Murgatroyd, *supra*.

(*u*) Detillin *v.* Gale, 7 Ves. 583.

If a mortgagee file a bill of foreclosure, or pray a sale, and it is found that nothing was due to him at the filing of his bill, he will be decreed to pay all the costs, including those of the reference and taking the accounts (*x*). And if after a decree to account, the mortgagee assigns over his mortgage, he must pay the costs of the supplemental bill for bringing the assignee before the Court (*y*); and it seems he must also pay the costs of bringing an insolvent mortgagor before the Court in a suit for foreclosure of leaseholds, although the assignees should, by their answer, disclaim all interest in the estate (*z*).

It is equity, that the creditor shall not be deprived of his pledge without payment of all sums of money due to him from his debtor, which form a general or specific lien on the land: and, therefore, if the mortgagee advance other sums of money to the mortgagor expressly by way of further charge (forming a specific lien); or on judgment, or statute (forming a general lien), neither the mortgagor, nor (generally speaking), any one claiming under him, shall be allowed to redeem without a settlement to the full amount (*a*); but this doctrine cannot apply if the security *could* not form a lien on the estate, either specifically or generally; and, therefore, as copyholds are not at law liable to an extent, a judgment debt cannot be tacked to a mortgage of copyhold land (*b*).

(*x*) Binnington *v.* Harwood, 1 Turner & Russell, 477.

(*y*) Barry *v.* Wren, 3 Russell, 465. (*z*) Collins *v.* Shirley, *supra.*

(*a*) 2 Eq. Fonbl. 270, 5th edit.

(*b*) Heir of Cannon *v.* Pack, 6 Ven. 222, pl. 6.

In a modern case (*c*), a question arose, whether a docketed judgment, on which no execution had issued at the time of the bankruptcy of the debtor, could be tacked to a mortgage executed by him of his estate, and this depended on the construction of the statute 21 Jac. I. (*d*), which declared that all creditors having security for their debts by judgment, statute, recognizance, specialty with or without penalty, or other security, &c. whereof there was *no execution or extent* served and executed upon the lands or goods, &c., of such bankrupt before such time as he should become bankrupt, should not be relieved upon any such judgment, statute, &c., for any more than a rateable part of their just debts with the other creditors. It was argued for the assignees, that the statute was peremptory, and the judgment creditor could not tack; but the Master of the Rolls observed, that it appeared to him very difficult to conceive how a supervening bankruptcy could affect the right of the first mortgagee; the statute, he thought, related to judgments that continued merely such at the time of the bankruptcy, and not to such as acquired all the effect of an actual mortgage, as in the present case of a judgment obtained by a party having an antecedent mortgage; and he decided accordingly.

The 6 Geo. IV. cap. 16, repealed the 21 James I. cap. 19, and by the 108th section of such act it was enacted, that no creditor having security for his debt, or having made any attachment in London,

(*c*) Baker *v.* Harris, 16 Ves. 397. (*d*) Cap. 19, sec. 9.

or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt, *except* in respect of any execution or extent served, or levied by seizure upon, "or any mortgage of or lien upon" any part of the property of such bankrupt before the bankruptcy. The statute then provided, that no creditor, though for a valuable consideration, who should sue out execution upon any judgment obtained by default, confession or nil dicit, should avail himself *of such execution*, to the prejudice of other fair creditors, who should be paid rateably with such creditors.

It is submitted that this enactment does not affect the decision in Baker *v.* Harris, and that a mortgagee is still entitled to tack a subsequent judgment in like manner as he might have done prior to the passing of the statute.

A doubt however arose at law, whether the act did not extend to cognovits actionem, with a stay of execution; to remove which doubt it was declared by 1 Will. IV. cap. 7, that no judgment signed or execution issued after the passing of that act on a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, according to the practice of the court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, should be deemed or taken to be within the said provision of the said act.

After the passing of this explanatory act, an attempt was made to bring judgments on warrants of attorney not obtained by collusion for the purpose of fraudulent preference, within the 1 Will. IV. But on the question being argued before the judges of the Court of King's Bench(*a*), they decided the contrary, and in giving judgment, Mr. Justice Parke said, "this was not an execution on a judgment by cognovit after declaration or judgment by default, confession or nil dicit in any action commenced adversely, but upon a warrant of attorney; the case, therefore, is not within the statute 1 Will. IV. cap. 7, To take it out of the 8th section of the Bankrupt Act, the endeavour must be to engraft upon the words there used 'any judgment obtained by default, confession, or nil dicit,' the terms of the other act,—'by collusion, for the purpose of fraudulent preference.' But we cannot adopt that construction. The act is general, and applies to all cases."

How far a *bond debt* may be tacked to a mortgage, has excited a good deal of discussion; the point appears to be now settled. The cases on this head, in the books, are numerous. It will be here sufficient to trace the doctrine, and state the results; premising only, that it makes no difference in the right of tacking, whether the bond debt is prior or subsequent to the mortgage (*b*), or whether the mort-

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(*a*) Crossfield v. Stanley, 4 B. & Ad. 87.

(*b*) Windham v. Jennings, 2 Ch. Rep. 247.

gage be made to the bond creditor originally, or be taken by assignment (*c*).

In an early case (*d*), which was heard before the Lord Keeper in Trinity term, 35 Car. II. (being prior to the statute of fraudulent devises), a mortgagor having brought his bill to redeem, the mortgagee insisted on his right to have a bond debt first paid, as well as the mortgage debt. The Court held, that although there was no special agreement proved that the land should stand as a security for the bond debt, yet the mortgagor should not redeem without paying both. In a case which was heard in the first of James II. (*e*), (being also prior to the statute), the like doctrine seems to have prevailed; although in that instance the land in mortgage happened to be held for a chattel lease; on which the Court seems to have laid some stress. In a case which occurred shortly after the passing of the act (*f*), a similar decree was made by Lord Chancellor Somers.

It is unnecessary to remind the reader, that, prior

(*c*) Halliley *v.* Kirtland, *ibid.* 360.

(*d*) Baxter *v.* Manning, 1 Vern. 244.

(*e*) Halliley *v.* Kirtland, *supra.*

(*f*) Anon. 3 Salk. 84. In a note to this case in the 6th edition it is stated, that, from the cases there cited, it appears that the mortgagee may tack his bond against the *mortgagor*, his heir or beneficial devisee, but not against creditors, trustees for creditors, or other persons entitled by a valuable consideration. It will be presently seen, that the learned editor has been misled as to the *mortgagor.*

to the statute of fraudulent devises, the devisee of a real estate was not subject to debts by specialty, and that if the heir aliened them before action brought, the creditor was without remedy at law. The 3 William and Mary (*g*) therefore made the beneficial devisee equally liable as the heir, and rendered them both subject to account at law for the value of lands aliened; but it was held that the statute did not apply to devises for payment of debts.

Soon after the passing of the statute, the rule as to the tacking of bond debts seems to have received a very considerable alteration as far as respected the mortgagor himself; for a new doctrine appears to have arisen, viz. that the right to tack the bond-debt to the mortgage was for the sole purpose of preventing a circuity of action (*h*); the heir and beneficial devisee having become at law liable to the debt. And, therefore, it was held, that the right to tack the bond-debt to the mortgage should be confined to these only, and not extend to the mortgagor; and much less to creditors or others claiming under him for a valuable consideration.

One of the earliest cases in which this new doctrine appears, is that of Challis *v.* Casborn (*i*); in which it was said by Mr. Vernon, and agreed to by the Court, that if a man has a debt owing to him by

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(*g*) Cap. 14, *et vide* 1 Will. IV. c. 47.

(*h*) *Vide* Heames *v.* Bance, 3 Atk. 680; Lowthian *v.* Hasel, 3 B. C. C. 162; Anon. 2 Ves. 665.

(*i*) Prec. in Ch. 407.

mortgage, and another on bond from the same person, he cannot tack them together against the mortgagor, but the mortgagor shall be let into a redemption on payment of the mortgage money only. In a subsequent case before Lord Macclesfield (*k*), the point is considered as clear; and the same rule is also laid down by Lord Hardwicke (*l*), and Lord Thurlow (*m*), and by the Judges of the Court of King's Bench, on an application to stay proceedings on payment of principal with interest and costs (*n*). The same doctrine is also distinctly recognized by Lord Alvanley in the case of Jones *v.* Smith (*o*); although, he observed, it was impossible to say why a bond might not be tacked to a mortgage as well as one mortgage to another.*

The point, therefore, may be considered as settled, that, as against the mortgagor himself, the mortgagee cannot insist on tacking a bond debt; nor does there seem to be ground for the difference hinted at by Mr. Cox in his valuable notes to Peere Williams (*p*), as to the application of this rule of

(*k*) Coleman *v.* Winch, 1 P. Wms. 777.

(*l*) Morrett *v.* Paske, 2 Atk. 53.

(*m*) Lowthian *v.* Hasel, *supra*.

(*n*) Archer *v.* Snatt, 2 Stra. 1107.

(*o*) 2 Ves. jun. 376.

* In the case of Sharpnell *v.* Blake and others, 2 Eq. Ca. Ab. 603, the Lord Chancellor is made to say, that by all the late cases a mortgagee can insist upon being paid a bond debt, even against the mortgagor himself. It is submitted, that by the context, it is manifest that the word 'can' is misprinted for 'cannot.'

(*p*) 1 P. Wms. 777.

court to cases between a mortgagor coming to redeem, and a mortgagee bringing his bill to foreclose; for, in some of the preceding cases, the question arose on a bill filed by the mortgagor.

The cases are uniform, that the heir (*q*), and also the beneficial devisee (*r*), must redeem both. But if the devise be for payment of debts generally, the mortgagee must, as to his bond debt, come in rateably with the other creditors (*s*); and the result is the same, whether there be an express trust or only a charge for the payment of debts (*t*).

If a mortgage be made of a chattel real, and the mortgagor die indebted to the mortgagee by simple contract, and the executor of mortgagor bring his bill to redeem, he must pay both debts (*u*).

As to mesne incumbrances, whether by mortgage, judgment, or statute staple, it was laid down by Lord Hardwicke, that the bond creditor must be postponed, for he had not the same equity against a puisne incumbrancer as against an heir at law (*x*). And this doctrine (which, as before observed, applies to a devise or charge in favor of creditors ge-

(*q*) Shuttleworth *v.* Laycock, 1 Vern. 245; Coleman *v.* Winch, *supra*; Windham *v.* Jennings, 2 Rep. in Chan. 228.

(*r*) Challis *v.* Casborne, 1 Eq. Ca. Ab. 325, pl. 9.

(*s*) Heams *v.* Bance, *supra*; Powis *v.* Corbett, 3 Atk. 556.

(*t*) Price *v.* Fastnedge, Amb. 685.

(*u*) Coleman *v.* Winch, *supra*; Eccles *v.* Thawill, Prec. Ch. 18; Anon. 2 Vern. 177.

(*x*) Morret *v.* Paske, *supra*; *et vide* Corbet *v.* Powis, 3 Atk. 556; Anon. 2 Ves. 662.

nerally) has also been held to extend to other bond or specialty creditors. This was decided in a case before Lord Thurlow (*y*), in which it was attempted to be argued that the rule applied to other creditors of a higher nature; but the Court decided that the mortgagee could not tack against the other bond creditors.

The bond creditor also cannot tack against the assignee of the heir (*z*), or of the beneficial devisee, or of the executor (*a*).

An assignee from the mortgagor may of course redeem without payment of the bond debt; this is distinctly laid down by Lord Somers, who says, "if the mortgagor mortgage his equity of redemption to another, the second mortgagee shall not be affected with the bond; for it is but a personal charge on the mortgagor (*b*). In the case of Heams *v.* Bance (*c*), a trust was created by the will of the mortgagor for payment of debts, and it was held to prevent the bond creditor from tacking.

In order to give a party paying off a charge the

(*y*) Lowthian *v.* Hasel, 3 B. C. C. 162.

(*z*) Bayley *v.* Robson, Pre. Cha. 89; Coleman *v.* Winch, *supra;* Troughton *v.* Troughton, 1 Ves. 87; Morret *v.* Paske, *supra;* Powis *v.* Corbet, *supra.*

(*a*) Coleman *v.* Winch, *supra;* Venderzee *v.* Willis, 3 B. C. C. 20.

(*b*) Anon. 3 Salk. 84; *et vide* Anon. 2 Ves. 663; Sharpnell *v.* Blake, 2 Eq. Ca. Ab. 603.

(*c*) 3 Atk. 630.

benefit of the incumbrance, the charge must be kept alive, or otherwise equity cannot give relief. Thus in a case, in which a person having become the purchaser of an estate which was subject to two mortgages, paid off the first mortgage, and took a conveyance of the legal estate from the first mortgagee to a trustee for himself; afterwards, he and his trustee granted an annuity to a party who had advanced part of the purchase-money, and who had constructive notice of the second mortgage; it was decided, that the second mortgagee had become the first incumbrancer (*d*).

And, if a party seised of the inheritance is also entitled to a charge upon it, the charge will be extinguished unless he does some act for keeping it on foot (*e*).

On the principle, that he who seeks equity shall do equity, and that equity will not deprive a creditor of the advantage of the legal estate, if obtained without fraud, it has been held, that if one estate is mortgaged for the payment of a debt, and another estate is mortgaged between the same parties for the payment of another debt, and the title to one estate proves defective, the mortgagor, or his assigns, shall not redeem without payment of both. In

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(*d*) Parry *v.* Wright, 1 Simon & Stu., 369, affirmed on appeal, 5 Russell, 141; *et vide* Toulmin *v.* Steere, 3 Mer. 210; Brown *v.* Stead, 5 Sim. 535.

(*e*) Tyler *v.* Lake, 4 Simons, 351.

Jones *v.* Smith (*f*), the Master of the Rolls said, he understood the doctrine to be, that if two separate estates were mortgaged, that is, the *legal estate* absolutely, and at law irredeemably conveyed, the Court will not interpose in favour of the redemption of one without the redemption of both. In a subsequent part of the same case he adds, that "the mortgagor having parted with his interest at law cannot redeem without coming into equity; and if he has pledged one estate for a sum which it is not sufficient to answer, he shall not have the other unless he pays both debts." It must be, therefore, understood, that, with respect to third persons, it is necessary that the mortgagee should have the *legal estate*, to entitle himself to the benefit before referred to.

The doctrine in question, (although somewhat doubted by Lord Hardwicke in *Ex parte* King (*g*),) appears to have been early recognized in equity. Thus in a case (*h*) heard in Hilary Term, 1681, it was stated by counsel as clear law, and not contradicted by the Court, that if a bill was brought to redeem two mortgages and there was more money lent upon one of them than the estate was worth, the plaintiff should not elect to redeem one, and leave the heavier mortgage unredeemed, but should be compelled to take both or none. In another case (*i*), heard in Trinity Term, 1684, the same doctrine is laid down in these words:—"So if there are two

(*f*) 2 Ves. jun. 376. (*g*) 1 Atk. 300.
(*h*) Purefoy *v.* Purefoy, 1 Vern. 29.
(*i*) Shuttleworth *v.* Laycock, 1 Vern. 245.

mortgages, and one is defective, if the mortgagor will redeem, he must take both." This was followed by a case (*k*), in which it appeared, that a man having made two several mortgages of several lands, and afterwards died, his heir at law claimed one of the estates, as tenant in tail, and filed his bill to redeem the other estate. The defendant stated the facts; and it was decreed that the plaintiff should redeem both or neither. And it is added, "So if one mortgage had been deficient in value, and the other mortgage had been more worth than the money lent upon it, the heir should not have been admitted to redeem the one without the other."

In the next case (*l*), the very circumstance occurred which was mentioned in Margrave *v.* Le Hook. It appears that the assignee of a bankrupt filed his bill to redeem a mortgage of the *Manor of Newington*, in Kent, made by the bankrupt to the defendant. The defendant by his answer stated, that he had first lent the bankrupt 200*l.* on mortgage of a *particular tenement*, and afterwards 300*l.* on the manor, which was of better value than the money due, and that the first mortgage was deficient in value. It was adjudged, that if the plaintiff would redeem one, he should redeem both.

It certainly appears remarkable, that after such an uninterrupted series of decisions and authorities, so excellent a judge of equity as Lord Hardwicke

(*k*) Margrave *v.* Le Hook, 2 Vern. 207.
(*l*) Pope *v.* Onslow, 2 Vern. 286.

should have expressed himself in the manner reported in *Ex parte* King (*m*); for in that case, the case of Pope *v.* Onslow being cited by Mr. Ord as an authority for the doctrine in question, Lord Hardwicke is made to say, that he was not satisfied this was the established rule of the Court; and that upon looking into the case of Pope *v.* Onslow, he found it very imperfect; and therefore declared he would not have it cited for the future, till it had been compared with the entry in the register's office; and added, he was very apt to believe that the tenements in Pope *v.* Onslow were parcel of and held of the manor, and *that* was the reason Lord Cowper so determined.

It seems, however, that Lord Hardwicke soon corrected his opinion; for in the much stronger case of Titley *v.* Davis (*n*), on an appeal to him from the Rolls, where a decree had been made on a bill filed by a purchaser of the equity of redemption of one of two estates in mortgage, that he must redeem both, and not one only, his lordship affirmed the decree. The same doctrine, to the like extent, was acted upon by Sir Thomas Sewell, in Tribourg *v.* Lord Pomfret (*o*), and was admitted in *Ex parte* Carter (*p*).

A case also occurred at law (*q*), in which the assignee of a bankrupt having moved to stay proceeding on payment of principal, interest, and costs due

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(*m*) *Supra.* (*n*) Cited in *Ex parte* Carter, Amb. 753.
(*o*) Cited *ut supra.* (*p*) Amb. 733.
(*q*) Roe *v.* Solly, 2 Bl. 726.

on the mortgage in question, it was objected that there were two other mortgages of different premises for certain other sums due from the bankrupt to the mortgagee, on which the Court refused to compel a redemption on payment of the first mortgage only, and discharged the rule with costs.

Two other cases are cited in Jones *v.* Smith (*r*) confirmatory of the doctrine, and extending it, as in the preceding cases of Titley *v.* Davis, Tribourg *v.* Lord Pomfret, and *Ex parte* Carter, to the assignee of the mortgagor, although without notice. The first is the case of Cator *v.* Charlton, heard the 21st of June, 1775. In that case, Stokes mortgaged to Charlton for 1400*l.* Afterwards Charlton advanced, at different times, several other sums of money, and different premises were added, and made redeemable on payment of 1900*l.*, and interest. These securities were registered; and afterwards the mortgagor assigned to the plaintiff the premises first mortgaged. The defendant (the mortgagee) admitted there was no agreement in writing or otherwise between Stokes and him that the first premises should be a security for more than 1400*l.* and interest, but he insisted that the plaintiff was not intitled to a redemption without paying the whole beyond the 1400*l.*; and *that registering the incumbrances was full notice of them.* The decree was, that the assignee could not redeem without paying the whole.

On a consideration of this case, it is apparent

(*r*) *Supra.*

that the decision could not have turned on the point of *notice*; registering not being of itself notice. The decree must therefore have proceeded on the general principle before stated. Accordingly we find, in the second of the cases above mentioned, the decision is not at all referred to the point of notice. This is the case of Collett *v.* Munden, heard before Lord Kenyon, May 31st, 1786, and in which he decided, that the assignee of the equity of redemption of one estate could not redeem without paying off a distinct mortgage on a separate estate.

In the case of Jones *v.* Smith also, the Master of the Rolls puts the doctrine on the broadest ground. He says, "Those cases, (that is, of Cator *v.* Charlton, and Collet *v.* Munden), amount to this, that if a man makes a mortgage, and afterwards makes another mortgage for another sum, and then assigns the equity of redemption of one, both must be redeemed, and the case of the assignee is not better than that of the original mortgagor."

In a case reported by Mr. Cox (*s*), the precise point is stated and decided. This was a bill filed by the purchaser of an equity of redemption against the mortgagee to redeem. The defendant by his answer stated a subsequent mortgage, made to him by the same mortgagor, of distinct premises, and for a distinct debt, and insisted that the plaintiff had no right to redeem the first mortgage, without re-

(*s*) Ireson *v.* Denn, 2 Cox, 425.

deeming the second. The Master of the Rolls said, he did not know why such a rule was ever laid down, but that it had been decided in many cases, that a mortgagee of two distinct estates, upon distinct transactions from the same mortgagor, was entitled to hold *both*, even against the purchaser of the equity of redemption of one of the mortgaged estates, *without notice* of the other mortgage, until payment of the whole money due on both mortgages; and his Honor thought the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit, and directed the cause to stand over to make these persons parties accordingly.

The preceding authorities therefore lead us to this conclusion, that if two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, and other estates be afterwards made a security for the sum already advanced, and also for further advances, but without any agreement that the first estate shall be charged with the further advances, nevertheless, neither the mortgagor nor any one claiming under him the equity of redemption of one of the estates, although without notice of the other mortgage or charge, shall be permitted to redeem one mortgage without redeeming both. From this doctrine it is manifest that great care and caution are requisite in a purchase or mortgage of an equity of redemption, and that the first mortgagee should not merely be questioned as to the amount of the actual mortgage on the estate intended to be purchased or

mortgaged, but generally, what is the extent of his charge or lien upon it.

It may be necessary to add, that to apply this doctrine, the transaction must be between the same parties, or those claiming under them; for if *A.* concur with *B.* in a mortgage of Whiteacre to *C.*, and afterwards *B.* mortgage Blackacre to *C.* for a different sum, nevertheless *A.* and those claimants under him may redeem Whiteacre without also redeeming Blackacre (*t*).

In some reports of Lord Northington, published by Lord Henley, a case is to be found (*u*) clashing with the decision in Ireson *v.* Denn, it being there considered as law, that the principle before discussed of the right of the mortgagee to insist on a redemption of both mortgages or neither, applies only so long as the equities of redemption remain united in the same person. But the current of modern authorities is certainly to the contrary, as observed by the editor in his note to that case, and as before mentioned.

There is, however, a distinction alluded to by the counsel for the plaintiff, in Willie *v.* Lugg, which may, perhaps, be considered to be sound, viz. in cases where the mortgages were originally made to different persons, and are afterwards assigned to one mortgagee, for in this case great injustice might arise

(*t*) Jones *v.* Smith, 2 Ves. jun. 376.
(*u*) Willie *v.* Lugg, 2 Eden, 78.

to the purchaser of one of the equities of redemption, if he could be prejudiced by a subsequent union of the legal estates in the same mortgagee. Perhaps it may not be unreasonable to suppose, that a farther distinction may be made in respect to the time when the purchase of one of the equities of redemption is completed, viz. whether before or after the union of the mortgages in one person; for if the mortgages should be united in the same person previously to the sale, that is, at the time when the equities remain united in one person, it may be considered, that, as the general principle will apply as against the mortgagor, the right having once accrued to the mortgagee shall not be defeated by the subsequent act of the mortgagor. But if the sale take place prior to the union of the mortgages, or, in other words, if the equities are separated before the mortgages are united, the right never accrues to the mortgagee.

It is laid down in a case of frequent reference (*x*), that if a sum of money be secured by mortgage, the mortgagor would not be admitted to redeem after the day of payment was lapsed, without paying likewise all that was due to the mortgagee *on notes or simple contract.* The same doctrine is stated in the Treatise on Equity (*y*).

Notwithstanding these authorities, a mortgagee, prior to the 3 & 4 Will. IV. cap. 104. could not, it seems, have tacked a mere simple contract debt

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(*x*) Demainbray *v.* Metcalf, Prec. in Ch. 421.

(*y*) Vol. II. 274, 5th edition.

against a mortgagor (*z*). In a modern case (*a*), it appeared that Hopkins had demised lands to Ford for a term of years, for securing 400*l.* and interest. A further sum was afterwards lent by Ford, who died, and Hopkins became bankrupt. The executors prayed a sale, and an application of the money produced by the sale to the discharge of both sums. Lord Eldon said, he was confident there never was a case where a man having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed; and the order was consequently confined to the mortgage debt. Since the passing of the statute, the law may probably be considered as altered, so as to allow a simple contract debt to be tacked against the heir or devisee, in cases in which there is not a devise for payment of debts.

A mortgagee of a lease or other chattel interest may tack a simple contract debt against the executor (*b*), but not against creditors coming to redeem, or purchasers for a valuable consideration (*c*), or creditors for whose benefit the equity of redemption has been assigned by the executor (*d*); and such a mortgagee may tack a bond debt against the mortgagor (*e*).

(*z*) Newby *v.* Cooper, Finch's Rep. 379; *et vide* Jones *v.* Smith, 2 Ves. jun. 378. (*a*) *Ex parte* Hooper, 19 Ves. 477.

(*b*) Coleman *v.* Winch, 1 P. Wms. 776.

(*c*) *Vide supra.*

(*d*) Adams *v.* Claxton, 6 Ves. 226.

(*e*) Halliley *v.* Kirtland, 2 Cha. Rep. 360.

The next rule to be noticed in the doctrine of tacking, applies itself to the rights of mesne or intermediate incumbrancers, and is of great importance to be well understood.

It is thus stated in the Treatise on Equity (*f*) :— "*In æquali jure melior est conditio possidentis;* Where equity is equal, the law shall prevail: and he that hath only a title in equity shall not prevail against law and equity. As a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first and before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage, for he has both law and equity."

In considering this rule of equity, Lord Hardwicke has remarked (*g*), "that it could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and equity on one side, the Court of Chancery never thought fit that, by reason of a prior equity against a man who has a legal title, that man should be hurt, and this by reason of the force which

(*f*) Vol. II. 300, 5th edition.
(*g*) Wortley v. Birkhead, 2 Ves. 574.

the court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore, potior est jure,* must hold."

The doctrine in question appears to have invariably prevailed in equity; for we find it laid down in a very early case (*h*), "that it was the constant practice of the court, if a purchaser *bonâ fide* did buy in an eigne incumbrance, statute, or judgment, and there were a judgment or statute mesne between that and his purchase, of which he had no notice at his purchase, that he should protect his purchase with the eigne incumbrance so brought in; and that though judgments were on record, and a purchaser was bound to take notice thereof at law, yet in equity, where the cognizee of a judgment comes to be helped to extend his judgment against a purchaser, he must shew express notice of the judgment in the purchaser, or else shall never be relieved against the purchaser (*i*)."

In a subsequent case of constant reference on this point, the doctrine was brought under the full consideration of the Lord Keeper, assisted by Lord Chief Baron Hale, and Justice Rainsford (*k*). In that case it appeared that English being seised of

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(*h*) Churchill *v.* Grove and others, 1 Ch. Ca. 35; 15 Car 2.

(*i*) *Et vide* Hacket and Bedell *v.* Wakefield, Hard. 172; 12 Car. 2.

(*k*) Marsh *v.* Lee, 2 Ventris, 337; 1 Ch. Ca. 168.

the manors of Wicksall and Monfield in fee, did, in 1649, mortgage PART of the manor of *Wicksall* to one Burrell for 1000*l.* In 1655, he acknowledged a statute to Burrell of 800*l.*, for securing 400*l.* In 1662, English mortgaged both manors to Mrs. Duppa, for 500 years, for 7000*l.* In 1665 he mortgaged the manor of *Wicksall to Lee*, for 2000*l.* Lee had no notice of the prior incumbrances. After Mrs. Duppa's death, her executors brought actions of ejectment against English, and filed their bill of foreclosure against him. In Michaelmas Term 1667, English suffered judgment in ejectment against him at the suit of the executors, with a *cesset executio* until May 1668. The *cesset executio* having expired, English obtained an injunction against the proceedings at law until hearing, and on the 5th of June, 1668, a decree was made, that English should redeem within a twelvemonth, or be foreclosed. On the 26th of November, 1668, the Master reported that 8530*l.* 14*s.* would be payable to the plaintiffs on the 6th of June 1669. On the 27th of November, 1668, Lee, by the advice of counsel, purchased in the mortgage and statute from Burrell. On the 5th of February, 1669, the Master's report was confirmed. Both the manors were afterwards extended by Lee under the statute. The executors then filed their bill against Lee, and prayed to be allowed to redeem on payment of principal and interest due on the securities given to Burrell. The Court held, first, that Lee might make use of these incumbrances to protect his own mortgage, for he had both law and equity for him. But that, secondly, inasmuch as the mortgage to Burrell was but of part of the manor of Wicksall, although the whole

manor was mortgaged to Lee, yet that the first mortgage should not extend to cover more than the part that was in the first mortgage. And Lord Chief Baron Hale put this case:—If a man, seised of sixty acres, mortgages twenty to *A.*, and then mortgages the whole to *B.*, and then the whole to *C.*, and afterwards *C.* purchases in the first mortgage, that shall not protect more than twenty acres; but it shall protect those twenty acres, so as *B.* shall never recover those lands until he pay *C.* all the money upon the first and last mortgages. And thirdly, Hale said, he thought, that in this case, inasmuch as the mortgage to Lee (*l*) was only of part of Wicksall, that, therefore, the executors might bring Lee to an account upon the extended value, whereupon these two manors were extended upon the statute; and that if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if the executors would pay down the residue of the money due upon the statute, or would pay down so much as the proportion would come to for Monfield, that then they might discharge the manor of Monfield, and he thought there might be a proportion found out by the Court.

In the preceding case the doctrine in question was established to its fullest extent, and in the case of Edmunds *v.* Povey (*m*), after long debate, in which it had been argued, that though this trade of buying in incumbrances had been formerly counte-

(*l*) This is clearly a mistake in the report, and means "to Burrell."
(*m*) 1 Vern. 187.

nanced, yet it was, in truth, against conscience, and contradictory to many established rules of law and equity, the Lord Keeper told the counsel, he wondered they laid their shoulders to a point that had been so long since settled and received as the constant course of Chancery; but he added, that although he would not change the rule which had so long prevailed in that Court, yet it might be, he would do so when he found a man designing a fraud, and thinking to made a trade of cozening by the rules of the Court (*n*).

An exception to the rule, however, prevails, if the first mortgagee takes the assignment as a trustee for another person; in which case he shall not be allowed to tack the mortgages, for if he might, then a mere stranger purchasing the third mortgage, and declaring he had bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers (*o*). In a modern case (*p*), a question arose, whether the executors of a first mortgagee of a leasehold, who had the legal estate in his own right, could, as against a mesne incumbrancer, tack a mortgage of the equity of redemption, which had vested in their testator as the executor of another. The facts were, that John Brooke assigned leasehold premises to Samuel Barnett for securing 3000*l.* He then made a second mortgage to him for securing 500*l.* He then mortgaged the equity of re-

(*n*) *Et vide* Holt *v.* Mill, 2 Vern. 280.
(*o*) Morrett *v.* Paske, 2 Atk. 52.
(*p*) Barnett *v.* Weston, 12 Ves. 130.

demption to Hunt for securing a sum of money. He then made a further charge to Samuel Barnett. He afterwards mortgaged the equity to Sadler, and ultimately to William Barnett, the brother of Samuel. William Barnett died, and appointed Samuel his executor. Afterwards Samuel died, and the bill was filed by the executors of Samuel claiming to be paid all the advances made by Samuel, and to tack the mortgage made to William, in preference to the mortgages of Hunt and Sadler. No case was cited. The Master the Rolls said it was surprising that no authority could be produced, for the point must have occurred. He then proceeded to state, that the law of that Court gave a person who had obtained a mortgage of the equity of redemption the chance, that, if he got in the legal estate, he would have a priority over the mesne incumbrancer. But, he asked, has that taken place? William Barnett never got the legal estate, nor did any executor of him ever get it, for Samuel Barnett did not get it, as his executor, but had it himself in his own right before William Barnett's mortgage had any existence, and nothing has happened to vary the rights. It was just the same, he added, as if the estates were in two different persons. As to all Samuel Barnett's own mortgages, the plaintiffs were, of course, entitled.

Before proceeding further, it may be necessary in this place to observe, that the advantage to be derived from getting in a precedent *statute* or *judgment*, depends upon the different procedure of the courts of law and equity in investigating the account on an extent; for, although lands are generally extended

at much less than their true value, yet at common law the conusor, or he that claims under him, has no relief but by bringing a *scire facias ad computandum*, in which the conusee does not account according to the true value, but according to the extended value, and for the whole judgment or statute (*q*).

In a court of equity, the conusor may, however, bring the conusee to account for what he hath actually received, and shall recover all above the debt with interest (*r*); but where an assignee of a judgment or statute extended is also a mortgagee, and consequently a creditor for a further sum, there he hath equal equity on his side to retain the lands until he be satisfied both for the statute and the mortgage; and he will not be brought to account for what he hath received above the statute or judgment debt on the extended value, unless he hath received enough to satisfy his mortgage also; consequently, if a mesne mortgagee would take off a statute or judgment in the hands of a puisne mortgagee by a suit in equity, the account must be as at law upon the extended value of what is due on the statute or judgment, and damages (*s*).

And in such case, where a statute, recognizance, or judgment is taken in by a mortgagee to defend a subsequent incumbrance, he will be no farther or

(*q*) 2 Vent. 338; 4 Co. 69 (b); 3 Atk. 518; *et vide* Powell on Mortgages, vol. 1, 524, 4th edition.

(*r*) *Vide supra*, page 71.

(*s*) *Et vide* 2 Atk. 52.

longer protected by it than until he hath received so much of the profits as will satisfy the original security on the extended value, for then it will be avoidable by a *scire facias ad computandum*, or by an account to be taken in the Court of Chancery (*t*).

But there is a distinction between the effect of purchasing in an outstanding judgment, and purchasing in a statute (*u*), for the mortgagee cannot procure to himself, by taking in such security, an advantage beyond the interest to which the owner of his security was entitled; therefore, as a judgment creditor can extend but a moiety, a judgment will protect but a moiety in the hands of his assignees; but if the first incumbrance be a statute staple, which, as before explained (*x*), attaches upon all the land of the conusor, a subsequent mortgagee buying in the statute may hold all the land, and thereby protect himself until *at law* the conusor of the statute, by a *scire facias ad computandum*, has got the statute vacated, which can only be upon payment of the penalty, for equity will not, in such case, give any assistance against a third mortgagee, without notice, until be has been paid his mortgage as well as the statute.

The doctrine established in Marsh *v.* Lee has been confirmed by a current of subsequent authori-

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(*t*) *Vide* The Earl of Huntingdon *v.* Grenville, 1 Vern. 52.

(*u*) *Vide* Powell on Mortgage, vol. 1, 482, 4th edition.

(*x*) *Supra*, Book I., Chap. V.

ties, with some modifications, arising from existing circumstances. The landmarks of this doctrine are accurately stated in the more recent case of Brace *v.* the Duchess of Marlborough (*y*), which it is intended shall form the basis of the following observations, in which an attempt will be made to point out in what respects the law, as laid down in that case, has since been altered, confirmed, or enlarged.

The first general rule laid down in the case of Bruce *v.* the Duchess of Marlborough is, "that if a third mortgagee buy in a first mortgage, *though it be pendente lite,* pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and having the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a plank gained by the third mortgagee, or *tabula in naufragio,* which construction is in favour of a purchaser, every mortgagee being such *pro tanto.*"

On this proposition, a matter of great importance occurs, viz. that although the third mortgagee get in the first mortgage, &c. *pendente lite,* he shall nevertheless be allowed to tack. The principle on which this doctrine is founded, is satisfactorily explained by Lord Keeper Henley (*z*). He says, "The rule of equity requires no more than that the third mortgagee

(*y*) Brace *v.* the Duchess of Marlborough, 2 P. Wms. 491.
(*z*) *Vide* 1 Eden, 530.

should not have had notice of the second at the time of lending the money; for it is by the lending the money without notice, that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is first discovered to him, (whether it be by *suit in equity*, or by any extra judicial means,) as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite.*"

This point may be considered as established. It will be seen that, in the before-mentioned case of Marsh *v.* Lee, there was in fact *lis pendens* at the time that Lee got in the mortgage from Burrell; and in a subsequent case, in which (*a*) a second mortgagee having filed his bill against the first and third mortgagees to discover their incumbrances, after the bill filed, the first mortgagee assigned to the third, and the Lord Chancellor conceived he might lawfully do so. In a case before referred to (*b*), Butler, an attorney, mortgaged to Pace in fee; he then made a second mortgage of the same premises to Jarvis and Watson in fee; he then made a third mortgage of the same premises to Belchier and Ironside in fee; he then made a fourth mortgage of the same pre-

(*a*) Hawkins *v.* Taylor, 2 Vern. 29.

(*b*) Belchier *v.* Butler; Renforth *v.* Ironside, 1 Eden, 523.

mises to Mary Butcher for a term of years; and, lastly, he made a fifth mortgage of the same premises to Renforth in fee, and delivered to him the complete title deeds. After the death of Butler, Belchier and Ironside, the third mortgagees, filed their bill against the devisee of Butler, and also against Pace, Renforth, and others, for a discovery of incumbrances. Renforth denied notice of the other incumbrances at the time the title deeds were delivered to him. Pace, the first mortgagee, said, that Butler delivered the title deeds to him at the time of the execution of his mortgage, but afterwards applied to him to see the writings, and gave him an undertaking that he would shortly return them; and Pace submitted to be redeemed by Belchier and Ironside. There is no further mention made in the report of the second mortgage to Jarvis and Watson. After these proceedings had been had, Renforth paid off the mortgage to Pace, and took an assignment of the security; and thereupon filed his cross bill, praying that the defendants might account with him for his own debt, and the mortgage to Pace. The judgment of the Court does not appear to have been at all influenced by the delivery of the title deeds. The decree was, that Renforth, by virtue of the assignment of Pace's mortgage, was entitled to hold the premises till satisfaction of the money due on both mortgages(*c*).

But although it is thus established, that *lis pendens*

(*c*) *Et vide* Turner *v.* Richmond, 2 Vern. 81; Robinson *v.* Davison, 1 B. C. C. 63; *et vide* Peacock *v.* Burt, Appendix.

is not sufficient to prevent the third mortgagee from tacking his debt to a prior security, yet the Court will not allow him to tack after a decree made to settle priorities. In the case of Bristol *v.* Hungerford (*d*), a mortgage creditor got in a judgment after the first decree made, and in truth after the Master's report; and Lord Cowper held, that the mortgagee should not have the benefit of the judgment to protect his mortgage.

In a subsequent case (*e*), Lord Hardwicke confirmed Lord Cowper's decree; and in a more recent case (*f*), Lord Eldon observed, "There is no difficulty upon the point as to a decree to settle priorities. After that, you cannot tack certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may, (as held in the House of Lords (*g*),) up to the time of the decree, struggle for the *tabula in naufragio*, and though the decree is in a sense only a judgment upon the rights as they stood at the time of the bill filed, yet it was decided in that case, that until the decree you might tack."

The second rule laid down in Brace *v.* the Duchess of Marlborough is, "that if a judgment creditor, or

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(*d*) 2 Vern. 524.

(*e*) Wortley *v.* Birkhead, 2 Ves. 574.

(*f*) *Ex parte* Knott, 11 Ves. jun. 619.

(*g*) Belchier *v.* Renforth, *supra*, *et vide* 5 B. P. C. 292.

creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite the mortgage to his judgment, &c. and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re*, nor *jus ad rem*. All that he has by his judgment is a lien on the land, but *non constat* whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *fieri facias*, or may take his body, after which, during the defendant's life, he can have no other execution: besides which, the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded, though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another."

This rule and the reasons for it are so distinctly explained in the preceding statement, that little remains to be said on it. . The distinction between the right of the mortgagee, having a specific lien, to tack his mortgage to a judgment, and of a judgment creditor, having a general lien, to tack his judgment to a mortgage, seems to be fully established. It was recognized by Lord Hardwicke in an anonymous case in Vesey (*h*), and there put on the ground, that the judgment creditor does not trust to the credit of the estate; and in the case of *Ex parte* Knott (*i*), Lord Eldon explained that a mere judgment creditor,

(*h*) 2 Ves. 662. (*i*) *Vide supra.*

though he deals originally for a lien, does not get *an estate originally* in the land; he has neither *jus in re*, nor *jus ad rem*. He is therefore entitled only as a judgment creditor to an *elegit*, and cannot tack (*k*).

If a judgment stand between two mortgages, the judgment creditor in a suit to redeem the first mortgage need not make the subsequent mortgagee a party to his bill in order to postpone him (*l*).

The next rule in Brace *v.* the Duchess of Marlborough necessary to be noticed is, that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, until both his securities are satisfied (*m*).

This rule results from the doctrine already noticed, viz. where equity is equal, the law shall prevail (*n*). But this principle will not apply unless the first mortgagee has the legal estate, *or the better right to call for it* (*o*); for otherwise, as hereafter noticed, the incumbrancers, whether by mortgage, judgment, statute, or recognizance, will be payable according to the priority of their respective incum-

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(*k*) *Et vide* Stephenson *v.* Hayward, Pre. Ch. 310; Breerton *v.* Jones, 1 Eq. Ca. Ab. 326.

(*l*) Shepherd *v.* Gwinnett, 3 Swanst. 151.

(*m*) *Et vide* Shepherd *v.* Titley, 2 Atk. 352.

(*n*) *Supra*, p. 471.

(*o*) *Vide infra*, p. 508.

brances (*p*); nor will it apply if the first mortgagee had notice of the mesne incumbrance at the time of making the further advance (*q*). It must be also remarked that the principle can not apply in case the mortgage is of copyhold land, for copyholds are not extendible under a judgment, and consequently the judgment does not form a lien on the land (*r*).

Another rule in Brace *v.* the Duchess of Marlborough is, that as it appeared in that case, that although a puisne incumbrancer had bought in a prior mortgage, in order to unite it to his puisne incumbrance, yet it being proved that there was a mortgage prior to the incumbrance bought in, he could make no advantage of his mortgage; because in all cases where the legal estate is outstanding, the several incumbrances must be paid according to their priorities in point of time; *qui prior est tempore, potior est jure.*

In reference to this rule, it is first necessary to remark, that as between mere equitable claims, equity gives no preference to mortgages, judgments, statutes, or recognizances, but they are all payable according to their respective priority of dates (*s*); and

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(*p*) Page 508. (*q*) *Vide infra*, p. 512.

(*r*) Heir of Cannon *v.* Pack. 6 Vin. 222, Pl. 6.

(*s*) Symmes *v.* Symonds, 4 B. P. C. 328; Turner *v.* Richmond, 2 Vern. 81; Lord Bristol *v.* Hungerford, 2 Vern. 524; 1 Eq. Ca. Ab. 142.

it may be next remarked, that an exception to the rule arises where any one of the incumbrancers has a better right than the others to call for an assignment or conveyance of the legal estate; for in such case, the creditor having such right, will, it should seem, be placed in equity in the same situation as if he had obtained an actual assignment (*t*).

In the case of *Ex parte* Knott (*u*), it was debated, whether the general rule applied as between the assignees of a bankrupt mortgagor and *bonâ fide* incumbrancers. In that case, a mortgage in fee was executed *subject to an outstanding term of years.*— Afterwards, a second mortgage was executed to another person; then (as was alleged) the mortgagor committed an act of bankruptcy, and afterwards executed a third mortgage to a different person, by whom, however, the act of bankruptcy was denied. A commission afterwards issued, grounded on the disputed act of bankruptcy, subsequently to which, the third mortgagee obtained a transfer of the mortgage in fee. The third mortgagee at first claimed a right to tack against both the assignees and second mortgagee, but on the argument, the claim against the second mortgagee was abandoned, on the ground that the term of years being outstanding, operated as his protection on the principle now under consideration. But as to the assignees, a distinction was

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(*t*) *Vide* Wyndham *v.* Richardson, 2 Ch. Ca. 213; Wilkes *v.* Boddington, 2 Vern. 599; Pomfret v. Windsor, 2 Ves. 487; *Ex parte* Knott, 11 Ves. jun. 618.

(*u*) *Supra.*

taken by the third mortgagee, who contended that they could not stand in a better situation than the bankrupt himself.

The assignees, on the other hand, contended that the assignment was a conveyance for the benefit of creditors, and placed them in the same situation as if the debtor had not been bankrupt, but had made a conveyance for the benefit of his creditors. The point was not decided, an issue being directed to try whether an act of bankruptcy had been committed previously to the date of the third mortgage.

In this case it was also endeavoured to be maintained by the assignees, that the commission resembled a decree to settle priorities, after which there can be no tacking, as before noticed (*x*). But the Chancellor denied the position, and said the commission was no judgment; it was only a conveyance for the security of creditors; from which it follows, that the issuing of the commission or fiat will not prevent the right of the mortgagee to tack, independent of the question of the advance being made after the commission or fiat issued (*y*).

The right of priority may be lost by *fraud*. In an able note by Mr. Fonblanque, in the Treatise on Equity (*z*), the principle is thus stated:—" If a man

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(*x*) *Vide* p. 504. (*y*) *Vide* p. 467.
(*z*) Vol. I. p. 164, 5th edit.

by the suppression of the truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation.

If *A.* being about to lend money to *B.* informs *C.* of his intention, and asks *C.* whether he has any incumbrance on *B.*'s estate, and *C.* denies that he has any, whereby *A.* is induced to lend his money to *B.*, and it proves that *C.* had at the time an existing mortgage or judgment on *B.*'s estate, this is fraud on the part of *C.*, and his security shall be postponed to that of *A.* But to fix *C.* with the fraud, it is necessary that he should be informed of *A.*'s *intention* to lend the money; for otherwise the fraudulent intention is wanting, on which the relief is to proceed, and the mere falsehood is not sufficient for such purpose (*a*).

If a prior incumbrancer is a party or privy to the subsequent transaction, and fraudulently conceals his incumbrance, this is also a ground for postponement (*b*), and more especially if the prior incum-

(*a*) Ibbotson *v.* Rhodes, 2 Vern. 554; *et vide* Hobbs *v.* Norton, 1 Vern. 136; Hunsden *v.* Cheyney, 2 Vern. 151, and the case of Pasley *v.* Freeman, 3 Term Rep. 51.

(*b*) Berrisford *v.* Milward, 2 Atk. 49.

brancer be professionally employed in the second transaction, and does not divulge his mortgage (*c*).

It was formerly held, that if a first mortgagee was a witness to a second incumbrance, this was sufficient evidence of concealment to postpone his mortgage (*d*); but this was subsequently questioned by Lord Thurlow (*e*), and does not seem now to be law.

How far the possession of the title-deeds gives a puisne mortgagee a preference over a prior incumbrancer, has been made the subject of much discussion. The early doctrine certainly was, that the mere fact of possession was such evidence of fraud on the part of the first incumbrancer, as of itself to postpone his security (*f*). A contrary opinion was, however, entertained by Lord Thurlow, who held there must be a *voluntary leaving* of the title-deeds to entitle the second mortgagee to postpone the prior incumbrancer (*g*). The like opinion was entertained by Lord Cowper (*h*), and confirmed by a decision of the Court of Exchequer, in the case of

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(*c*) Draper *v.* Borlace, 2 Vern. 370.

(*d*) Moratta *v.* Murgatroyd, 1 P. Wms. 393.

(*e*) Becket *v.* Cordley, 1 B. C. C. 357, *et vide supra.*

(*f*) *Vide* Goodtitle *v.* Morgan, 1 Term Rep. 762; and Evans *v.* Bicknell, 6 Ves. jun. 183.

(*g*) Tourle *v.* Rand, 2 B. C. C. 653, and Penner *v.* Jemmatt, there cited.

(*h*) Peter *v.* Russel, 1 Eq. Ca. Ab. 321; 2 Vern. 726; Gilb. Rep. 122.

Plumb *v.* Fluit (*i*). In Evans *v.* Bicknell (*k*), the Lord Chancellor denied it to be *an established rule* that a second mortgagee with the title-deeds, without notice of any prior incumbrance, should be preferred. In the case of Barnet *v.* Weston (*l*), the point was given up without argument; and in a later case (*m*) the counsel admitted the general doctrine, but endeavoured to establish collusion and fraud, in which he failed. From this it may be conceded, that at the present day the want of possession of the title-deeds by the first mortgagee is open to explanation, and is only *primâ facie*, and not conclusive, evidence of fraud.

In all instances of the right to tack, it must be intended that the party claiming the right had no notice of the other incumbrance at the time of lending his money, for (as observed in Brace *v.* the Duchess of Marlborough) this is his sole equity, and the notice must positively be denied (*n*), whether charged by the bill or not (*o*). What will amount to notice has been already considered (*p*). An exception to this rule appears to exist in a case of a

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(*i*) Cited 1 Fonb. 167, 5th edit.

(*k*) *Supra.*

(*l*) 12 Ves. jun. 133.

(*m*) Martinez *v.* Cooper, 2 Russ. 198.

(*n*) Cason *v.* Round, Pre. Ch. 226.

(*o*) 3 Pr. Wms. 244, note.

(*p*) *Vide supra*, "Notice;" and see also 2 Eq. Ca. Ab. 615, the case of Brothers *v.* Bence, in which a steward of a manor was held bound by notice arising from his admission of a mesne incumbrancer to a copyhold.

mortgage being made to secure the sum then lent. and also further advances, and a second mortgage being afterwards made to another person *with notice of the first*, and further advances being subsequently made by the first mortgagee *with notice of the second:* in which case, Lord Cowper held, the first mortgagee might tack against the second, because it was the folly of the latter to lend his money on such a security (*q*).

Notwithstanding the dictum of Lord Redesdale in Latouche *v.* Dunsany (*r*), and the decision of Lord Erskine in *Ex parte* Herbert (*s*), it appears that an act of bankruptcy by the mortgagor, prior to the lending, will not prevent tacking (*t*); the judgment of Lord Eldon in *Ex parte* Knott (*u*) being manifestly inaccurately reported, and not bearing the construction put on it by Lord Erskine.

Whether a *commission* of bankruptcy was so far *notice* as to prevent tacking of monies advanced subsequently to it, was an unsettled point; the case of Hitchcock *v.* Sedgwick (*x*), which was considered by Lord Talbot, in Collet *v.* De Gols, as an authority for such doctrine, having been reversed by the House of Lords (*y*). But since the passing of

(*q*) Gordon *v.* Graham, 7 Vin. 52.

(*r*) 1 Sch. & Lef. 152.

(*s*) 13 Ves. 189.

(*t*) *Vide* Collet *v.* De Gols, For. 70; Co. Bankrupt Laws, Vol. I p. 800, and Foxcroft *v.* Devonshire, 2 Burr. 938.

(*u*) 11 Ves. jun. 609.

(*x*) 2 Vern. 155. (*y*) 2 Vern. 162, note.

the 6 Geo. IV. c. 16, by which the issuing of a commission or fiat is made notice after the adjudication of the bankruptcy in the London Gazette, if the person to be affected by notice might reasonably be presumed to have seen the same, a commission or fiat must, it seems, under the circumstances stated in the statute, prevent tacking (*z*).

Equity is not scrupulous by what means a *bonâ fide* incumbrancer, without notice at the time of advancing his money, obtains a legal protection for his security; for if he get in a judgment or statute which is satisfied, yet if he can make use of it at law for his protection, equity will not interfere to prevent him (*a*). In like manner, he may use a satisfied term for his protection (*b*). Nor is it material, although no consideration be paid by the mortgagee for the assignment of the judgment or term (*c*). But to give an incumbrancer the advantage of a judgment, statute, or recognizance against an eigne mortgagee, the strict forms of law, as to enrolment and docketing, must, it is conceived, have been complied with, or otherwise they will not avail (*d*). If a judgment, &c. be got in by a mortgagee, equity will not

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(*z*) *Vide supra*, 467.

(*a*) Edmunds *v.* Povey, 1 Vern. 187; Sadler *v.* Bush, 2 Vern. 30.

(*b*) *Vide* Willoughby *v.* Willoughby, 1 Term Rep. 763.

(*c*) Churchill *v.* Grove, 1 Ch. Ca. 35; Holt *v.* Mill, 2 Vern. 279; 1 Eq. Ca. Ab. 323.

(*d*) *Quære* whether the doctrine of notice, as recognized in Davis *v.* Strathmore, 16 Ves. 419, would apply to this case. *Vide supra*, p. 73.

permit a prior incumbrancer to procure a surreptitious release (*e*).

It is laid down by Mr. Powell (*f*), on the authority of a dictum in Equity Cases Abridged (*g*), that if a first mortgagee purchase in a subsequent judgment, *without the consent of the mortgagor*, a mesne mortgagee may redeem without payment of both, because such a transaction tends to burthen the estate, without bettering the security of the mortgagee; a position which, it is submitted, is not tenable.

(*e*) Earl of Huntingdon *v.* Grenville, 1 Vern. 49.
(*f*) *Vide* 1 Powell, 536, 4th edit.
(*g*) Vol. I. p. 326.

CHAPTER II.

OF INTEREST.

THE act of the 12th of Queen Anne, stat. 2, cap. 16, has enacted, " that all bonds and assurances for the payment of any principal money, whereupon more than five *per cent.* shall be reserved or *taken* (*a*), shall be void." This law was afterwards relaxed in favour of mortgages made in England of estates in Ireland or the West Indies (*b*); the statute of the 14th of Geo. III. cap. 79, having enacted, " that all mortgages and securities which, after the passing thereof, should be made and executed *in Great Britain* of or concerning any lands, tenements, hereditaments, slaves, cattle, or other things, lying and being in Ireland, or in any of his Majesty's colonies, plantations, or dominions in the West Indies, or any estate or interest therein, to any of his Majesty's subjects for securing the repayment of the sums of money thereon respectively to be really and *bonâ fide* lent, with interest for the same, *and all bonds, covenants, and securities for payment of the same sum of money and interest,* and all transfers or assignments which should be made and executed *in Great Britain,* of

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(*a*) As to this, *vide* 3 Atk. 154.

(*b*) That prior to the passing of the 14th Geo. III. such a mortgage was within the 12th of Anne, see Stapleton v. Conway, 3 Atk. 727; 1 Ves. 428.

mortgages, securities, *or bonds,* should be as valid, and effectual as such mortgages, securi- *nds, covenants,* transfers, or assignments, would ne same were made and executed in any island, tion, country or place, where the lands, tene- , hereditaments, slaves, cattle, or other things mentioned or comprised in any such mortgage, ty, transfer, or assignment as aforesaid, seve- ay or were; and that none of his Majesty's ts should be subject or liable to any of the ies or forfeitures of the said act of Queen Anne, eiving or taking interest for the sum or sums of r lent on any such mortgage, security, *bond,* nt, transfer, or assignment as aforesaid, so as terest so to be received or taken did not ex- he rate of *six per cent. per annum.* But it was ed that the act should not make good any such age, security, *bond, covenant,* transfer, or assign- where the lender or lenders of any sum or of money should knowingly advance or lend n more money than the lands, &c. in such ages, &c. should be, at the time or times of cing or lending such sum or sums of money as aid, really and *bonâ fide* worth to be sold. And ll persons borrowing any sum of money under thority of that act upon any such land, &c. ding the value which the same should, at the f borrowing such money, be really and *bonâ* orth to be sold, over and above all incum- es which should then affect the same, should triple the value of the sum borrowed; the one be paid to the informer, the other half to the rer of Greenwich Hospital. And that all such

mortgages or other securities granted under the authority of the said act, by which such lands, &c. were intended to be charged or affected, should be registered within the island, &c. where the said lands, &c. severally lay or were, within the time limited by the laws of such island, &c.; or otherwise the same should be subject to the several provisions and penalties of the statute of Queen Anne in such manner as the same would have been if the said act of George the Third had never been passed, unless the mortgagee, or other person or persons for whose behoof such mortgage or other security should have been made or granted, should have *bonâ fide* used his or their utmost endeavour to cause the same to be registered within the time thereinbefore limited for that purpose.

On this statute of George the Third, a doubt arose, whether it authorized a bond or covenant executed for payment in England of the principal money secured on lands in Ireland or the plantations, reserving more than 5 *per cent.*, on the ground, it is said, that the statute does not mention *personal contracts* (*c*). The case referred to, as raising this doubt, was heard before the Court of King's Bench (*d*). The circumstances were, that in the purchase of an estate in the West Indies, it was agreed that part of the purchase-money should be secured by the bond of the purchaser, and of some other person resident in England, with interest at 6 *per cent.* A bond

(*c*) 2 Powell, 959. (*d*) Dewar *v.* Sparr, 3 T. R. 425.

was accordingly executed by the purchaser and his surety, to the vendor. *After the vendor's death*, his personal representative agreed that the bond should be *cancelled*, and further time given, and a fresh bond should be entered into by the purchaser and a different surety for payment of the principal with the like rate of interest; and accordingly another bond was given by the purchaser and the defendant. In this case the Court, on action brought by the obligee against the surety, held that the bond was usurious, the statute not extending to *personal contracts*. On perusing the act it is difficult to arrive at this conclusion, as the statute expressly mentions bonds and covenants, which are both personal contracts. But independent of this consideration, it is submitted that to make the case apply to the matter in question, it must be conceded that the personal representative of the vendor, notwithstanding the release of the first bond, had still an equitable lien on the lands for the money due (a position which it might be difficult to maintain); for otherwise it was merely the case of a bond between two persons resident in England, for interest at 6 *per cent*.

To remove, however, the scruples excited by the last-mentioned decision, as well as the doubts entertained by the profession at large on the point, an act was passed in the 1 & 2 Geo. IV. (*e*), to explain the Act of the 14th of Geo. III., by which, after reciting the act of the 14th of the late king and that

(*e*) 1 & 2 Geo. IV. cap. 51.

doubts had been entertained whether the provisions and declarations of the said act extended to bonds and covenants of third parties given as a collateral security for the payment in Great Britain of the interest for the sums of money advanced or lent as therein mentioned, it is enacted, for obviating such doubts, that all mortgages and securities which, by any of his Majesty's subjects already had been, or thereafter should be, made and executed in Great Britain, of and concerning any lands, tenements, hereditaments, slaves, cattle, or other things lying and being in Ireland, or in any of the colonies, plantations, or dominions in the West Indies, or any estate or interest therein, to any of his Majesty's subjects, for securing the repayment of the sums of money thereon respectively, really, and *bonâ fide* advanced and lent, with interest for the same, whether payable in Great Britain, or in the country, island, plantation, or place where the lands, tenements, hereditaments, slaves, cattle or other things mentioned and comprized in any such mortgage, security, transfer, or assignments as aforesaid severally lie or are; *and all bonds and covenants* which had been or which thereafter should be made and executed *in Great Britain,* either by the person borrowing such sums of money, or *by any other person or persons,* either residing in Great Britain or elsewhere, by way of collateral security for the payment of such interest; and all transfers and assignments which had been or which thereafter should be made and executed in Great Britain, of such mortgages, securities, or bonds, to any of his Majesty's subjects,

should be as good, valid, and effectual, to all intents and purposes whatsoever, as such mortgages, securities, bonds, transfers, or assignments would have been if the same had been made and executed, and the interest thereon had been made payable, and the person or persons entering into such bonds or covenants by way of collateral security had resided in the country, island, plantation, or place where the lands, tenements, hereditaments, slaves, cattle, or other things mentioned and comprized in any such mortgage, security, transfer, or assignment as aforesaid, severally lie or are; and that none of his Majesty's subjects in Great Britain should be subject or liable to any of the penalties or forfeitures in the act made in the 12th year of Queen Anne, by receiving or taking, or having received or taken interest for the sum or sums of money really and *bonâ fide* advanced or lent, or to be advanced or lent, on any such mortgage, security, bond, covenant, transfer, or assignment as aforesaid, so as the interest so to be received or taken do not exceed the rate of 6*l. per cent. per annum.* This statute has set at rest the doubt before stated.

It is material to consider to what extent, and in what manner, the interest due on a mortgage debt may, *by agreement inter partes*, be converted into *principal*, and carry interest.

The governing principle acted upon in matters of mortgage by Courts of Equity is, (as already frequently noticed,) that the mortgagee shall be entitled only to principal, interest, and costs; and it protects the debtor with peculiar jealousy against

any attempt on the part of the mortgagee, by taking advantage of the necessities of the mortgagor to impose on him harsher terms. Acting on this principle, equity has held that an agreement entered into at *the time of the loan*, for converting interest into principal from time to time as it shall become due, is oppressive and unjust, and tending to usury, and that consequently it cannot be supported (*f*).

When interest has once accrued due, it becomes a debt. There is no longer therefore, any objection to an agreement *inter partes* that it shall be considered principal, and thenceforth carry interest. Indeed it would be injurious to the mortgagor to establish the contrary, as it would remove an inducement to the mortgagee's permitting his principal to remain; and consequently equity has recognised such agreements (*g*); but there must be no extortion on the part of the mortgagee, or otherwise equity will interpose to the relief of the mortgagor; as in a case reported in Atkins (*h*), in which the mortgagee compelled the mortgagor to come to an account every six months, and convert interest into principal at 5*l. per cent.*, when the interest reserved in the deed on the principal money, was at 4 and a half *per cent.* only. According to the report in Atkins, Lord Hardwicke decreed an account of the principal money

(*f*) Broadway *v.* Morecraft, Mosely, 248; Mitford *v.* Featherstonhaugh, 2 Ves. 445; Sir Thomas Meer's case, cited in For. 40; Ossulston *v.* Yarmouth, Salk. 448; Chambers *v.* Goldwin, 9 Ves. 271.

(*g*) Brown *v.* Barkham, 1 P. Wms. 654.

(*h*) Thornhill *v.* Evans, 2 Atk. 330.

with interest at 4 and a half *per cent.*, and of any fresh advances with interest at 5*l. per cent.* To this case, a note is added by Mr. Saunders, by which it appears that the Court allowed interest at 4 and a half *per cent.*, only, for such arrears of interest as the mortgagor had, by agreement in writing, consented should be converted into principal.

Equity considers the arrear of interest so converted into principal by agreement between the parties, in the light of a *further advance.* But inasmuch as a further loan made by a mortgagee after notice of a puisne incumbrance is not allowed to be tacked, but must be postponed to that incumbrance, it follows that a mortgagee shall not be allowed to convert interest into principal, as against a subsequent charge of which he had notice at the time of the agreement (*i*).

The conversion of interest into principal must appear by the manifest intention of the mortgagor: it is not sufficient that an account be *stated* between the parties. As a general proposition it may be laid down, that the agreement that interest shall become principal and carry interest, must be declared by writing under the hands of the parties (*k*); but this will not extend to the case of a balance on a banking account, which, by the custom of trade, is made up of principal, and of interest turned into prin-

(*i*) Digby *v.* Craggs, Amb. 612; 2 Eden, 200.
(*k*) Brown *v.* Barkham, *supra.*

cipal, by successive rests, and interest on such interest (*l*).

The mortgage duty must be paid on the amount of interest converted into principal by agreement *inter partes*, in like manner as on any other fresh advance.

In a modern case (*m*), two singular questions arose as to compound interest on mortgage. It appeared that a good legal mortgage had been executed by Bassett, for securing to one Brooman 750*l.* and interest half-yearly. Subsequently a second mortgage was executed between the same parties for a sum of 1200*l.*, which was composed of the principal sum of 750*l.*, and interest thereon, *with interest on that interest*. The mortgage was assigned to Sacket, who filed his bill of foreclosure against Bassett and Brooman. On the usual reference to the Master to take an account, he reported his opinion, that nothing was due on the second mortgage, it being usurious, and that the first mortgage had been satisfied by the second, and consequently nothing was due on that mortgage. It was contended for the assignee of the mortgage, that the second mortgage was valid, because the interest having become due, was a debt recoverable at law; but even if it were usurious, yet the first mortgage would be good. The Vice-Chancellor directed an action at law to be brought on the covenant in the second mortgage deed, to try whether it was usurious or not.

(*l*) Rufford v. Biggs, 5 Russell, 316.

(*m*) Sacket v. Bassett, 1 Madd. 58.

In a case heard before Lord Keeper North (*n*), his lordship attempted to introduce a general principle, that as to so much of the interest as was reserved in the body of the mortgage deed, it should be accounted principal, for being ascertained by the deed, an action of debt would lie for it; and, therefore, it was reasonable there should be damages given for the non-payment of the money; and although it was urged there was not any such precedent in the Court, and if established, every scrivener would reserve all his interest half-yearly from time to time, so long as the money should be continued on the security, which would be to change the law and practice of the Court, and make all mortgagors pay interest upon interest; yet the Lord Keeper said, he was clear in that distinction between debt and damages, and saw no inconvenience that could ensue; it would only serve to quicken men to pay their just debts, and he decreed accordingly.

The rule so attempted to be introduced by the Lord Keeper, has not, however, been followed, and it is conceived its establishment would have had the effect above alluded to, *viz.* that of making all mortgagors pay interest upon interest, and might have been the means of oppression on the debtor. If, as is urged (*o*), the compound interest would have the effect of preventing the mortgagee proceeding against the mortgagor when an arrear became due, that advantage can be still obtained by the mort-

(*n*) Howard *v.* Harris, 1 Vern. 190; *Et vide* note, 4 Madd. 64.
(*o*) *Vide* note, 4 Madd. 64.

gagee by such an arrangement, when the arrear of interest has arisen. In practice it is found, that a considerable arrear of interest is frequently allowed to take place before any harsh proceedings are commenced by the mortgagee, during which period the debtor is released from the weight of compound interest, and in those cases, in which the regular payment of the interest is of importance to the creditor, the allowance of compound interest for the non-payment would be a very inadequate remuneration, and would not long have the effect of preventing a sale or foreclosure. In the case of Thornhill *v.* Evans (*p*), a demand was made by the mortgagee for compound interest for fifty days, on the supposition that he was entitled to interest upon the interest in arrear when the mortgage was paid off; but Lord Hardwicke refused it, saying it was never allowed in a Court of Equity. The like decision had been made in an earlier case (*q*), the Master of the Rolls adding, that although the profits were not sufficient to answer the interest, yet the arrears could not carry interest, but the cost and charges must.

Interest will not be given on interest of a bond debt computed in the Master's report (*r*), nor on arrears of annuity, although the annuity is charged on land (*s*).

(*p*) *Supra.*

(*q*) Proctor *v.* Cooper, Pre. Ch. 116; 2 Vern. 377.

(*r*) Turner *v.* Turner, 1 Jac. & Walker, 46.

(*s*) Creuze *v.* Hunter, 2 Ves. jun. 163; Booth *v.* Leycester, Palmer *v.* Leycester, 1 Keen, 241.

A different rule formerly prevailed in respect of the arrears of interest on mortgage found due by the Master's Report, from the confirmation of which report, the principal, interest and costs were considered as converted into one principal sum, on which, if further time for payment was given the mortgagor, interest was to be computed (*t*). But the practice is now altered, and the time is enlarged, upon *payment of the interest and costs found due*, and the *subsequent interest* on the *principal only*, and subsequent costs are directed to be computed and taxed (*u*).

But a distinction is, it seems, taken between a decree for a sale and for foreclosure. In the latter case the practice is as above stated. But in the case of a decree for sale the arrear of interest may, after the confirmation of the Master's report, be converted into principal, and carry interest if without prejudice to intervening mortgages, and other incumbrances (*x*).

In a prior part of this treatise it has been observed (*y*), that the mortgagor, not being bound by the settlement of accounts between the mortgagee and assignee, *à fortiori* cannot be prejudiced by any

(*t*) Bickham *v.* Cross, 2 Ves. 471; Creuze *v.* Hunter, Turner *v.* Turner, *supra*.

(*u*) Whatton *v.* Cradock, 1 Keen, 269.

(*x*) Neal *v.* The Attorney-General, Moseley, 247; Harris *v.* Harris, 3 Atk. 772; and Digby *v.* Craggs, 2 Eden, 201.

agreement between them to increase the amount of the principal due, and consequently the arrears of interest cannot, generally speaking, without his concurrence, be converted into principal, and tacked to the mortgage (*z*). The rule, however, admits of distinctions upon particular circumstances, as in the case of Ashenhurst *v.* James (*a*), heard before Lord Hardwicke, in which it appeared, that a decree had been obtained for a sale of the equity of redemption of an estate, and that the defendant, who was a puisne judgment creditor, had become the purchaser; there were two prior judgments, and a mortgage on the estate; the defendant, at the desire of the mortgagee, took an assignment of the two first judgments; the mortgagee afterwards filed his bill to redeem and for an assignment of the two judgments; the defendant claimed interest for the principal and interest paid by him to the judgment creditors, and it was allowed.

It is a general rule in equity, that tenant for life of an equity of redemption shall be compelled to keep down the interest accruing during the period of his being in possession (*b*), for which purpose the reversioner or remainder-man may file his bill for relief (*c*);

(*z*) Earl of Macclesfield *v.* Fitton, 1 Vern. 168; Ashenhurst *v.* James, 3 Atk. 271; Porter *v.* Hubbart, 2 Rep. in Ch. 43.

(*a*) *Supra.*

(*b*) Hungerford *v.* Hungerford, Gilb. Rep. Eq. 69; 5 Ves. jun. 106.

(*c*) *Vide* Hayes *v.* Hayes, 1 Ch. Ca. 223.

and if tenant for life suffer the interest to run in arrear, and die, the reversioner or remainder-man may in equity call on his personal representatives to discharge the arrears. In a modern case (*d*), the mortgagee having permitted tenant for life to run in arrear, purchased the life estate, and the Court directed him to apply the surplus rent beyond the current interest towards liquidation of the arrears.

The tenant for life, however, is only answerable during the period of his possession, and, therefore, if there be tenant for life, with remainder over for life, under the same settlement, and the first tenant for life permit the interest to run in arrear, the second tenant for life shall not be compelled by the reversioner or remainder-man out of the rents to discharge the arrears (*e*).

A careful distinction must, however, be drawn between the last-mentioned case and certain cases, with which it may be easily confounded. As for example;—If an estate be limited in strict settlement, *subject to a jointure created by a prior settlement*, and during the life of the jointress, the surplus rents are not sufficient to keep down the interest, so that it runs in arrear, and afterwards the jointress dies in the life-time of the tenant for life, on which there arises a surplus rent beyond the current interest, the tenant for life must, during the continuance of his estate in the property, apply the surplus rent in re-

(*d*) Lord Penrhyn *v.* Hughes, 5 Ves. jun. 99.
(*e*) *Vide* 1 Ves. 95.

ducing the arrears (*f*). In like manner, if an estate be limited to *A.* for life, with remainder (as to part) to *B.* for life, remainder (as to the whole) to *C.* for life, with power to *A.* to charge the estate with a sum of money, but not so as to incumber the life estate of *B.*, and *A.* charges the whole estate with a sum of money carrying interest, and dies, and then, during the life of *B.*, the estate of *C.* in possession is not sufficient to discharge the interest which runs in arrear; and afterwards *B.* dies in *C.*'s lifetime, *C.* will be compelled to apply the surplus rents of the whole estate towards liquidation of the arrears (*g*).

If the estate of the wife is subject to a mortgage, the husband and wife are not bound to keep down the interest for the benefit of the heir of the wife, and therefore the amount of interest actually due at the death of the wife, should be added to the principal, and the husband, entitled as tenant by the curtesy, should keep down the interest of the aggregate sum during the remainder of his life. But he is not entitled to any allowance for interest actually paid by him during his wife's life (*h*).

Tenant in tail in possession cannot be compelled to keep down the interest on a mortgage, because the reversioner and remainder-man are considered as wholly in his power (*i*). But an exception to the

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(*f*) Revel *v.* Watkinson, 1 Ves. 93.

(*g*) Tracey *v.* Hereford, 2 B. C. C. 128.

(*h*) Ruscomb *v.* Hare, 2 Bligh, 192.

(*i*) Amesbury *v.* Brown, 1 Ves. 477; Chaplin *v.* Chaplin, 3 Pr. Wms. 235.

rule arises if the tenant in tail is an *infant*, in which case the reasoning does not apply; and it is therefore decided, that the guardians or trustees of an infant tenant in tail, are bound to apply the rents in keeping down the interest; and if the guardian permits the interest to run in arrear during the infancy of the tenant in tail, an account of the rent and profits will be decreed after the infant's death (*k*). And even in the case of infant tenant in *fee*, the guardian is bound to keep down the interest of incumbrances out of the rents, and not increase the infant's personal estate at the expense of the real estate (*l*). If tenant in tail of full age keeps down the interest and dies, his personal representative will not be creditor for the amount of interest paid, but the remainder-man, or reversioner will have the benefit (*m*); and in a case in which it appeared that a man being seised of lands in right of his wife, who was tenant in tail in possession, subject to a subsisting mortgage, took in the mortgage, and during his wife's life was himself in receipt of the rents; the Court, after the wife's death, and on a bill filed by the reversioner to redeem, refused the husband interest on the mortgage during the period he had been in possession of the rents (*n*).

A distinction has been taken, and is now well

(*k*) Sergison *v.* Sealey, 2 Atk. 416; Burgess *v.* Mawbey, 1 Turner & Russell, 165, and cases there cited.

(*l*) Jennings *v.* Lock, 2 Pr. Wms. 276.

(*m*) 1 Ves. 481.

(*n*) Amesbury *v.* Brown, *supra*; *et vide* Ware *v.* Polhill, 11 Ves. 278; Ruscomb *v.* Hare, *supra*.

established in equity between an agreement, that the rate of interest shall be raised if not punctually paid, (which equity holds to be in the nature of a *penalty*, and to be relieved against, even in case of gross default (*o*)); and an agreement, that on punctual payment the interest shall abate, which latter agreement will be supported in equity, if strictly performed, *but not otherwise* (*p*).

An exception to the first-mentioned rule has been supposed to exist in case there is in the mortgage deed a direct *covenant* for payment of the increased rate of interest (*q*). The authority for this distinction is in a case in Vernon (*r*), in which the precise point certainly appears to have been decided, on the ground that the covenant being *the agreement* of the parties, was not to be relieved against; a reason which does not seem to have much weight, since every proviso is in fact an agreement, and it may be

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(*o*) *Vide* Stanhope *v.* Manners, 2 Eden, 199; Lady Holles *v.* Wyse, 2 Vern. 289; Strode *v.* Parker, *ibid.* 316; Jory *v.* Cox, Pre. Ch. 160; Nicholls *v.* Maynard, 3 Atk. 519; Walmsley *v.* Booth, Barnard, 48; Bonafous *v.* Rybot, 3 Burr. 1375.

(*p*) *Vide* Jory *v.* Cox; Nicholls *v.* Maynard; Stanhope *v.* Manners, *supra.*

(*q*) *Vide* Powell, 962, 963.

(*r*) Marquis of Halifax *v.* Higgins, 2 Vern. 134; 1 Eq. Ca. Ab. 28.—Note, it is stated in Pre. in Ch. 161, that the agreement in Lord Halifax *v.* Higgins, was in a separate deed, and it has been queried whether that circumstance made a difference, *et vide* 15 Viner, 453; Powell, 963. But it is submitted, that the circumstance alluded to could not vary the case, as the instruments must be considered as forming one instrument.

considered, that the case of Halifax *v.* Higgins, has been overruled by the subsequent authorities (*s*).

An exception, however, must be made in case the increased rate of interest is the consideration *for forbearance* on the part of the creditor, and does not constitute part of the original agreement on the loan, in which case, if the compensation be reasonable, equity, it seems, will not interfere (*t*).

It is also proper to bear in mind, that the agreement for an abatement of interest, (although it must be strictly performed, and the breach of it cannot be relieved in equity,) yet is not so closely regarded in the light of a condition, as to be utterly defeated by a single breach of it, if the language of the agreement will bear a different construction. Of this an instance is to be found in the case of Stanhope *v.* Manners (*u*), in which the agreement was, that as *often as* the interest should be paid half-yearly on the days appointed, or within three months next after, so much should be deducted as would make the interest three and a half *per cent.* The first half-year's interest was not paid within the time. The tender of the second half year's interest (at three and a half *per cent.*) was made within the limited period, but

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(*s*) *Et vide* 2 Eden, 199, note.

(*t*) Burton *v.* Slattery, 5 B. P. C. 68, 233, and Brown *v.* Barkham, 1 P. Wms. 652; 15 Viner, 453. *Et quære*, whether the note to 2 Eden, 199, is not incorrect in stating the case of Brown *v.* Barkham to be overruled.

(*u*) *Supra.*

was refused on the ground that the default made in the first half year defeazanced and annihilated the agreement. Lord Nottingham thought otherwise, and said, that words could not be stronger to express the intent of the parties, that *in every instance* where the three and a half *per cent.* was tendered *in time,* it should be accepted, and decreed accordingly.

Generally speaking, in order to stop payment of interest on mortgage, six calendar months' notice (*x*) by the mortgagor to the mortgagee, with proof of strict tender on the very day on which the six months expire, will be requisite; for if strict tender is not made, the Court cannot stop the interest (*y*).

The mortgagor should also, it is said (*z*), be ready to make oath that the money has always been ready, and no profit made of it, which fact may be controverted by the mortgagee, who may prove the contrary, in which case the interest will run on (*a*).

Lord Hardwicke has remarked (*b*), there is not one case in twenty upon the fact of an absolute refusal after a tender, that is ever made out, for they are generally attended with circumstances that explain the refusal. In the case then before him (*c*), a bill was brought to redeem a mortgage on the 8th of May, 1742, insisting on redemption on payment of

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(*x*) Sharpnell *v.* Blake, 2 Eq. Ca. Ab. 608.
(*y*) Bishop *v.* Church, 2 Ves. 371; *et vide ibid.* 678.
(*z*) Lutton *v.* Rodd, 2 Ch. Ca. 206.
(*a*) Gyles *v.* Hall, 2 Pr. Wms. 378.
(*b*) 3 Atk. 89. (*c*) Wiltshire *v.* Smith, *ibid.*

principal money only,—and that interest ought to end on the 20th of February, 1741, on which day the six months' notice had expired, and on which day principal and interest and a deed of assignment had been tendered and refused. The defendant alleged, there were covenants in the deed of assignment, on which he wished to advise with his solicitor. Lord Hardwicke said, the mortgagor's attorney should have left a copy of the ingrossment of the assignment with the mortgagee, that he might have had time to advise upon it; and the mortgagor's attorney should have appointed a time to pay the money after the mortgagee had been allowed a sufficient time to advise; and he directed the usual reference to the Master to take an account of principal, interest, and costs.

The debt being a sum in gross and collateral to the land, the tender must be made personally to the mortgagee, and it is not sufficient to make it on the land (*d*); but if there be a place of payment named in the mortgage deed, although the place has reference to a strict payment according to the proviso in the deed, yet it seems, that notice of payment at that place will be sufficient in equity (*e*); and a tender at the house of the mortgagee has been held sufficient, although it did not appear that the mortgagee was then within doors, it being shewn that he had notice, the tender would be so made (*f*). And if a place be not named in the deed for payment of the

(*d*) 5 Bac. Abr. 113. (*e*) Sharpnell *v.* Blake, *supra*.
(*f*) Manners *v.* Burgess, 1 Ch. Ca. 29.

money, yet if the mortgagor give notice of a reasonable place of payment, the tender has been held to bind the mortgagee (*g*).

If the right to the equity of redemption be in dispute (*h*), the tender will not stop the payment of interest. And if there be a mortgage from *A.* to *B.* for a sum certain, and an open account between the parties, with a balance due from *B.* to *A.*, a tender of the mortgage money, deducting the balance due on the account, will not stop the interest, nor prevent costs being allowed to the mortgagee (*i*).

On an account being settled between mortgagor and mortgagee, and all interest paid up to that day, and interest computed up to a future day, and a note given by the mortgagee to the mortgagor, promising to re-convey on payment of principal and interest on such future day, it was held that tender made on the day to the *executors* of the mortgagee (who had died in the mean time,) although they had not proved the will, was sufficient to stop the interest (*k*).

In order to stop the payment of interest, the tender must, it is said, be made by one interested in the estate, and not by a stranger (*l*).

Interest is payable *de die in diem*, and must,

(*g*) Gyles *v.* Hall, *supra.* (*h*) Sharpnell *v.* Blake, *supra.*

(*i*) Garforth *v.* Bradley, 2 Ves. 678.

(*k*) Austen *v.* Executors of Dodwell, 1 Eq. Ca. Ab. 318.

(*l*) Watkins *v.* Ashwick, Cro. Eliz. 132; Bac. Ab. Vol. 5, 113.

therefore, be apportioned. The consequence is, that if tenant for life of a sum of money secured by mortgage, die within a current half-year, his executors will be entitled to the interest to the day of his death (*m*); but the public funds being in the nature of perpetual annuities and in the nature of rents, the dividends payable in respect thereof were not apportionable until the passing of the recent statute of the 4 & 5 Will. IV. cap. 22 (*n*).

In a modern case (*o*), a question arose, whether a devisee of an estate in mortgage was entitled to set off an arrear of interest due at the death of the mortgagor against the arrears of interest due on a legacy given by the mortgagee to the mortgagor for life, and not received by the mortgagor, who was one of the executors of the mortgagee; and it was decided, with some appearance of hardship, that he was not. The facts were, that one Richard King mortgaged his lands to Thomas Shurmer (his uncle), for 4000*l.* Shurmer, by his will, gave to trustees 7500, in trust to invest it and pay the dividends to King (the mortgagor), for life, with remainder to his issue; and appointed King and the trustees executors. King, by his will, after disposing of his personal estate subject to a provision for his debts, except debts due on mortgage, gave his real and leasehold estates to his cousin, John Pettat, for life, subject to such mort-

(*m*) Edwards *v.* Warwick, 2 Pr. Wms. 171; Wilson *v.* Harman, 2 Ves. 672.

(*n*) 4 & 5 Will. IV. c. 22, s. 2.

(*o*) Pettat *v.* Ellis, 9 Ves. 563.

gages as should be due thereon at his decease; and he directed the interest thereon to be kept down by Pettat during his life, with remainder over. At the death of King, there was due to him for arrears of interest on the 7500*l.* a considerable sum of money; and there was due from him on the mortgage the whole of the mortgage money and interest. The bill was filed by the devisee of King against the surviving executor of Shurmer and the residuary legatee and executor of King, praying for an account of what was due from King at his death on the mortgage and to him for arrears of interest on the 7500*l*; and that what was due on the latter account might be set off against the former, and that on payment of the balance he might be permitted to redeem. On the cause coming on to be heard, it was urged for the plaintiff, that the testator King had done no act signifying his intention that his dividends should not be applied to the liquidation of the interest of the mortgage, and that his permitting the dividends to remain was equivalent to a declaration that they should be so applied, and it would prevent circuity of action. The Master of the Rolls allowed, that if the parties had settled accounts the day before King's death, the accounts must have been taken in the way the plaintiff intended, but it did not follow that the account after King's death was to be so taken. In our law, he observed, the debt still subsisted; and it is only by a process in our courts that the adjustment takes place, though by the civil law it operates *ipso jure*. Until that adjustment, the debts might be separately assigned, for they are not extinguished. He asked, what was the debt at the

time of the death of King? Suppose he had sold the estate subject to the mortgage, could the vendee institute a suit to have an account such as this taken? His Honor then dismissed the bill against the residuary legatee and executor of King, and directed an account of what was due to the surviving executor of Shurmer for principal and interest, on payment of which the plaintiff was to be allowed to redeem.

Although it is a general rule, that interest on a bond shall not go beyond the penalty (*p*), yet the rule does not apply in case the bond debt is also secured by a mortgage, even although the mortgage is given by a surety, and subsequently to the bond (*q*).

By the recent Statute of Limitations it is enacted, that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land, or rent, or in respect of any legacy, or any damages in respect of any such arrears of rent or interest, shall be recovered by any distress, action, or suit, but *within six years* next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have

(*p*) Bromley *v.* Goodere, 1 Atk. 80; White *v.* Sealey, Doug. 49; Tew *v.* Lord Winterton, 3 B. C. C. 489; Knight *v.* Maclean, 1 B. C. C. 498; Mackworth *v.* Thomas, 5 Ves. 329; Clarke *v.* Seton, 6 Ves. 411; Wilde *v.* Clarkson, 6 T. R. 303, which overruled Lonsdale *v.* Church, 2 T. R. 388.

(*q*) Clarke *v.* Lord Abingdon, 17 Ves. 106; *sed vide* Lloyd *v.* Hatchett, 2 Anstr. 524; Bac. Ab. 5, 156.

been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*r*).

(*r*) 2 & 3 Will. IV. c. 27, s. 42.

CHAPTER III.

OUT OF WHAT FUND THE MORTGAGE DEBT SHALL BE DISCHARGED.

Prior to our consideration of the fund out of which the mortgage is to be satisfied, it must be remarked, that in case twenty years had elapsed without payment or demand of interest, a court of equity would in general presume the mortgage was satisfied (*a*).

And whatever doubts might have been entertained on the subject, the recent statute of the 3 & 4 Will. IV. cap. 27 (*b*), has set them at rest, by enacting, that after the 31st day of December, 1833, no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but *within twenty years next* after a present right to receive the same, shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of

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(*a*) Trash *v.* White, 3 B. C. C. 289; Christopher *v.* Sparke, 2 2 Jac. & Walk. 228; *sed vide* Hales *v.* Hales, 1 Ch. Rep. 105; Selson *v.* Fletcher, *ibid.* 59; Toplis *v.* Bate, 2 Cox, 118; Lemon *v.* Fortescue, 2 Ves. sen. 51.

(*b*) 3 & 4 Will. IV. c. 27.

the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given.

A mortgage is *a debt* by specialty (*b*). It follows from the known rules both of law and equity, that as between the real and personal representatives of the *debtor*, the personal estate is primarily liable to the payment of the debt, and must indemnify the real estate against it. All instances to the contrary are mere exceptions to this general rule; and whether the lands in mortgage devolve on the heir at law as *hæres natus* (*c*), or on a general devisee as *hæres factus* (*d*), or on a particular devisee (*e*), in either case the personal estate must, in the absence of evidence of intention to the contrary, become the primary fund, and exonerate the real estate, descended, or devised, from the debt.

To render the rule, however, applicable, the mortgage must be *the debt* of the party; if it is not *his* debt, there is no ground for the application of the

(*b*) *Supra*, p. 1.

(*c*) Cope *v.* Cope, 2 Salk. 449; Howel *v.* Price, 1 Pr. Wms. 292.

(*d*) Lutkyns *v.* Leigh, For. 54; Galton *v.* Hancock, 2 Atk. 436.

(*e*) Pockley *v.* Pockley, 2 Ch. Ca. 84; 1 Vern. 36; Johnson *v.* Milksopp, 2 Vern. 112; *et vide* 2 Atk. 436.

rule. In a modern case(*f*), a person seised of an estate subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix. The residuary personal estate was more than sufficient to discharge the mortgage, which was, however, continued on the estate during the life of the widow, who died intestate, leaving her brother her heir at law. *Administration de bonis non* to the effects of the husband, and also administration to the effects of the wife, were granted to the defendants, against whom the brother filed his bill, claiming to be indemnified against the mortgage out of the personal estate of the husband. The Vice-Chancellor refused his claim, chiefly on the ground, that although the residuary personal estate of the husband had, by the will, become the property of the wife, yet the debt of her husband not having become *her* debt, *her* heir-at-law had no claim to be indemnified out of *her* personal estate against the debt of another person.

Although the debt be not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own*, in which case, the consequences before referred to will follow, that is, his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt.

The report books contain numerous cases founded on the distinctions before noticed. We shall divide

(*f*) Scott *v.* Beecher, 5 Madd. 96.

our inquiry on this subject into two branches; first, into the cases in which no doubt has arisen as to the loan being the proper debt of the party, but the question has been whether the general rule before mentioned was under the circumstances applicable or not: and, secondly, into the case in which no question was made as to the application of the rule, but the doubt has been whether the loan was the proper debt of the party.

As to the first branch of our inquiry.—It was formerly held, that if the loan was admitted to be the debt of the party, nothing short of an *express declaration* of intention to the contrary (*g*) would discharge the personal estate from being the primary fund for its discharge, and very able judges have regretted the rule was ever departed from (*h*). It is, however, now decided, that the intention of the party to exempt the personal estate from the *onus* of being the primary fund for the payment of his debts, may be evinced not only by direct declaration, but also by *implication plain* (*i*). It is manifest, this decision was opening the door to litigation; but at the same time it must be admitted, that it does not seem easy to advance any substantial reason wherefore equity should refuse its assistance in the one case

(*g*) Fereyes *v.* Robinson, Bunb. 301; *et vide* Duke of Ancaster *v.* Mayer, 1 B. C. C. 462; and Bootle *v.* Blundell, 1 Mer. 216.

(*h*) *Vide* Watson *v.* Brickwood, 9 Ves. 453; Bootle *v.* Blundell, Ancaster *v.* Mayer, *supra*; Gittings *v.* Steele, 1 Swanst. 28.

(*i*) *Ubi supra*; *et vide* Driver *v.* Ferrand, 1 R. & M. 681; Blount *v.* Hipkins, 7 Sim. 43.

rather than in the other; for a *direct* declaration is nothing more than an indication of intention, and if such an intention be indicated on the face of the instrument, although not in direct terms, yet a refusal of the aid of equity would apparently be a sacrifice of the rights of parties to a mere form of words.

It has been also urged (*k*), that, admitting an indication plain to be sufficient, yet the intention must be so manifest as to be clear to any person of plain and ordinary capacity, not possessed of technical legal knowledge. This, however, was denied by Lord Eldon, who concurred in opinion with the Master of the Rolls, in Brummel *v.* Protheroe (*l*), that the indication of intention will be sufficient if it satisfies the mind of the judge deciding upon the case (*m*).

It is evident that cases of the kind under consideration must greatly depend on the particular circumstances of each individual instance, and it is difficult to extract from them any general principles for our guide in other instances.

In some of the earlier cases, evidence *dehors* the will was received to show the testator's intention (*n*),

(*k*) *Vide* Arguments of Counsel in Bootle *v.* Blundell, 1 Mer. 207, 208.

(*l*) 3 Ves. 113.

(*m*) Bootle *v.* Blundell, *supra;* Rhodes *v.* Rudge, 1 Sim. 83; Dawes *v.* Scott, 5 Russ. 32; Driver *v.* Ferrand, *supra;* Blount *v.* Hipkins, *supra.*

(*n*) Bamfield *v.* Windham, Prec. Ch. 101; *vide* Stapleton *v.* Colville, For. 202.

But on this point Lord Eldon has expressed his clear opinion (*o*), that with regard to circumstances *dehors* the will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a will, such a question being fit to be decided only by an *examination of the whole will taken together.*

It may be deduced from the adjudged cases, that it is not sufficient for a testator to show an intention to *charge his real estate* with the payment of his debts, whether by a trust for sale, limiting a term, or simply charging the estate; he must show an intention to *exempt his personal estate* (*p*). In this, a distinction may arise in the case of a testator directing a particular debt to be paid out of a particular portion of the real estate, a circumstance affording, as remarked by Sir William Grant, a very different infer-

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(*o*) 1 Mer. 216; *et vide* Lord Inchiquin *v.* French, 1 Cox, 9; Amb. 33; 1 Wils. 83; Andrews *v.* Emmot, 2 B. C. C. 303.

(*p*) Dolman *v.* Smith, Pre. Ch. 456; French *v.* Chichester, 2 Vern. 568; Stapleton *v.* Colville, For. 202; Haslewood *v.* Pope, 3 P. Wms. 325; Fereyes *v.* Robinson, Bunb. 302; Walker *v.* Jackson, 2 Atk. 625; Bridgman *v.* Dove, 3 Atk. 202; Inchiquin *v.* French, *supra*; Samwell *v.* Wake, 1 B. C. C. 144; Aldridge *v.* Lord Wallscourt, 1 Ball & Beatt. 312; Watson *v.* Brickwood, 9 Ves. 447; Tait *v.* Northwick, 4 Ves. 816; Tower *v.* Lord Rous, 18 Ves. 132; Bootle *v.* Blundell, *supra*; Rhodes *v.* Rudge, *supra.*

ence from a devise to sell for payment of all debts, which evinces nothing more than an intention that all the debts shall be paid, and the real estate, if that is necessary, applied, but will not exonerate the personal estate (*q*).

Lord Eldon has justly observed (*r*), that on a comparison of all the cases that have arisen on the subject, it is scarcely possible to find any two in which the Court altogether agrees with itself, there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention that has not been considered in other cases as against the same inference. As particular circumstances have, however, been allowed by different judges to have more or less weight in inducing their inference of the testator's intention to exempt his personal estate from the payment of his debts, it will be necessary to advert to the leading features of the decided cases on this subject.

The strongest inference *against* the claim of exemption of the personal estate, appears to be the circumstance of its having fallen to the *executor* for his benefit, *virtute officii,* prior to the 1 Will. IV. c. 40 (*s*), or in an instance of the gift of the personal estate to the executor as a legacy, and the appointment of him

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(*q*) Hancox *v.* Abbey, 11 Ves. 186; *et vide* Walker *v.* Pink, cited 1 Cox, 5. (*r*) 1 Mer. 219.

(*s*) Grey *v.* Grey, 1 Ch. Ca. 296; Meade *v.* Hide, 2 Vern. 120; Gray *v.* Minnethorpe, 3 Ves. jun. 106; *et vide* Rhodes *v.* Rudge, *supra.*

to be executor, being in one and the same sentence (*t*); but the converse of the proposition above stated, *i. e.* the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate (*u*). Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of personal estate, as a specific legacy exempt from the payment of debts.

In one particular case (*x*), a decision to that effect was made by Lord Hardwicke, which has not received the approbation of succeeding judges. In that instance a testator willed that all his estate in the county of Lincoln should be sold as soon as his executrixes conveniently could, for payment of his lawful debts and legacies, and funeral expenses; and after giving several legacies, he appointed Emma Marshal and Dorothy Dupre joint executrixes, but made no express disposition of the residue of his personal esate. By a codicil he gave to his executrixes all his personal estate not before devised. Lord Hardwicke held they took the personal estate exempt from debts, on the ground of the direct bequest to the executrixes: a circumstance which, Lord Thurlow observed, has been considered by other judges as

(*t*) Cutler *v.* Coxeter, 2 Vern. 302; Barton *v.* Barton, *ibid.* 308; White *v.* White, 2 Vern. 43; *Anon.* 2 Vent. 349; Noke *v.* Darby, 3 B. P. C. 290; French *v.* Chichester, 2 Vern. 568; Bromhall *v.* Wilbraham, For. 274.

(*u*) Hall *v.* Brooker, Gilb. Rep. 73.

(*x*) Walker *v.* Jackson, 2 Atk. 624.

affording a contrary conclusion (*y*); and in which conclusion, Lord Northington, in Stephenson *v.* Heathcote (*z*), and Lord Eldon, in Bootle *v.* Blundell (*a*), seem to have coincided.

The circumstance of the *same persons* being appointed trustees and executors has had considerable weight in inducing judges to draw an inference that the personal estate is not to be exempted (*b*); and Lord Alvanley has remarked (*c*), that the circumstance of the trustees not being the executors, affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate.

The gift of the *whole personal estate* has been considered as favourable to the inference of the bequest being intended to be exempt from the payment of debts; and evidence *dehors* the will has in some of the early cases been admitted to shew that the fund, if applied in payment of debts, would be exhausted (*d*).

A bequest of a *residue* has always been considered

(*y*) Ancaster *v.* Mayer, *supra*.

(*z*) Cited 1 B. C. C. 458. (*a*) 1 Mer. 223.

(*b*) Dolman *v.* Smith, Prec. in Ch. 456; *et vide* Stephenson *v.* Heathcote, cited 1 B. C. C. 458; Ancaster *v.* Mayer, *supra*; Bootle *v.* Blundell, 1 Mer. 230; Rhodes *v.* Rudge, 1 Sim. 79.

(*c*) 3 Ves. 108.

(*d*) Bamfield *v.* Wyndham, Prec. Ch. 101; Wainwright *v.* Bendlowes, 2 Vern. 718; Kynaston *v.* Kynaston, cited 1 B. C. C. 457; Heath *v.* Heath, 2 P. Wms. 366.

unfavourable to the claim of exemption (*e*). But a distinction has been drawn in cases in which the residue has been immediately preceded by an enumeration of specific articles, not likely to be intended by the testator to be sold (*f*); and also in cases in which the residue has been considered as not meaning the residue after satisfaction of debts, &c., but the residue of the personal estate before specifically bequeathed (*g*); and in all cases in which, from circumstances, it can be considered as specific, it will be exempted.

The circumstance of the possession of the real and personal estate accruing to one and the same person, *i. e.* of the real estate charged with debts being limited in strict settlement, and the personal estate being given to the same person who is entitled to the possession of the real, so that the personal estate is made to accrue to the real, has been differently considered by different judges. The better opinion is, that as a testator could not intend that his *settled* family estate should be burdened with debts, and his personal estate be given away, discharged from debts,

(*e*) Lord Inchiquin *v.* French, 1 Cox, 1; Phillips *v.* Phillips, 2 B. C. C. 293; Stephenson *v.* Heathcote, cited 1 B. C. 458.

(*f*) Adams *v.* Meyrick, 1 Eq. Ca. Ab. 271; Braidnox *v.* Gratwich, cited 3 P. Wms. 325; Blount *v.* Hipkins, 7 Sim. 43.

(*g*) Attorney-General *v.* Barkham, cited For. 206; Adams *v.* Meyrick, *supra;* Anderton *v.* Cook, cited 1 B. C. C. 456; Waise *v.* Whitfield, 2 Eq. Ca. Ab. 374; Walker *v.* Jackson, 2 Atk. 624; Stapleton *v.* Colville, For. 201.

to be squandered and dissipated, he must have meant that his personal estate should not be exempt (*h*).

If a trust for sale is created out and out, and the general personal estate was prior to the 1 Will. IV. c. 40, left to devolve on the *executor*, the legatee of the surplus money to arise from the sale of the devised estate had a right to call on the general fund for its indemnity (*i*); but if the general personal fund is given to a stranger, the presumption of intention will incline in favour of its exemption (*k*).

It seems that the omission to charge *funeral expenses* on the real estate, is a circumstance of some weight, to shew that the personal estate is not to be exempt, because funeral expenses are the first charge on that fund (*l*), and also because it shews that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the will, and being once broken in upon, the argument of its being specific is destroyed (*m*).

Several modern cases on this subject having occurred, it may be proper to notice the particular circumstances attending each.

(*h*) Dolman *v.* Smith, Pr. Ch. 456; Hazlewood *v.* Pope, 3 P. Wms. 323; Harewood *v.* Child, cited For. 204.

(*i*) Gray *v.* Minnethorpe, 3 Ves. 103.

(*k*) Wainwright *v.* Bendlowes, Pre. Ch. 451; Webb *v.* Jones, 2 B. C. C. 60; Holliday *v.* Bowman, cited 1 B. C. C. 145.

(*l*) Burton *v.* Knowlton, 3 Ves. 107.

(*m*) *Vide* Brydges *v.* Phillips, *infra*.

In the case of Burton *v.* Knowlton (*n*), the real estate was devised to two trustees, upon trust to sell, and thereout pay all mortgages and incumbrances, and all other debts and funeral expenses, and invest the residue in stock, and pay the rents and profits of the lands unsold, and the annual income of the money arising from the sale, after payment of debts, to J. Welch for life, and after his decease to convey and assign the real estate and the produce thereof not sold or applied, to the heirs or heir at law of William Cockell. The testatrix then bequeathed several specific and pecuniary legacies, and gave 200*l.* to be paid by the trustees after the decease of J. Welch, as he should appoint; and all the rest and residue of her personal estate, not before specifically bequeathed, she gave to J. Welch, in trust *as she should appoint*, and in default of appointment, in trust for himself, and she appointed him *executor*. She died without making any appointment, and the Master of the Rolls decided the personal estate *was exempt*.

In a case (*o*) decided nearly at the same time and by the same judge, the real estate was devised to a trustee, in trust, in the first place, *to pay all the testator's debts*, and, subject thereto, in strict settlement; and he gave *all* his personal estate to his brother, E. Blewitt, who was one of the devisees of the real estate, and appointed him executor. It was decided the personal estate was *not exempt*.

(*n*) *Supra.* (*o*) Brummel *v.* Protheroe, 3 Ves. 111.

In Tait *v.* Lord Northwick (*p*), the testator devised all his newly purchased real estate to trustees, upon the trust declared by certain indentures of conveyance of other estates for the payment of particular debts, and subject to such trusts then in trust to sell and pay all other debts whatsoever, and subject hereto to the like uses as were declared in the indentures of the other estates. He gave a pecuniary legacy to his executors, and bequeathed all the rest and residue of his personal estate to his two sisters, and appointed two of the trustees executors. It was decided the personal estate was *not exempt*.

In a subsequent case (*q*), the will commenced with a direction that all the testator's just debts and funeral and testamentary expenses should *in the first place* be paid, which direction was of itself sufficient to charge the real estate subsequently devised (*r*). The testator then gave certain specific legacies, and devised and bequeathed all his messuages and lands and monies in the funds to William and Henry Hartley, their heirs, executors, &c., in trust, out of the rents, dividends, &c. to pay all his just debts and funeral and testamentary expenses, and the several legacies thereinafter mentioned. He then gave certain pecuniary legacies, and an annuity of 300*l.* to be paid out of the rents and dividends to his wife for life, and the residue of the rents and dividends he

(*p*) 4 Ves. 816. (*q*) Hartley *v.* Hurle, 5 Ves. 540.

(*r*) Williams *v.* Chitty, 3 Ves. jun. 545; Shallcross *v.* Finden, *ibid.* 738; King *v.* Denison, 1 V. & B. 274; *et vide* Keeling *v.* Brown, 5 Ves. 359.

directed should be paid to his daughter, until his grand-daughter attained twenty-one, or married: and then he directed the trustees, out of the rents and dividends, to pay his grand-daughter 300*l.* a year, for her life, and to pay the residue to his daughter for life, and after her decease he gave and devised all his said messuages and lands and monies in the funds to his grand-daughter, her heirs, executors, &c. He then directed that his leasehold estate should not be sold, and all the rest and residue of his real and personal estate, not by him otherwise given or disposed of, he gave to his daughter, her heirs, executors, &c., and appointed her, with the trustees, executors. It was held the personal estate given to the daughter was *not exempt.*

In the case of Brydges *v.* Phillips (*s*), the testator devised all his real estates not included in his marriage settlement, or which had not since been purchased by him, to trustees, upon trust to sell, and thereout pay all his just debts, (except a mortgage on part of the premises, and a sum of 4000*l.* for his two sisters, charged on his settled estates,) and in the next place pay a legacy of 1000*l.* to his half sister, with lawful interest from the decease of the testator's father, and to pay a legacy of 4000*l.* to his wife, and all the residue of his said unsettled estates, and also all his settled estate, in case there should be a failure of his issue male, he devised to his wife for life, with remainders over. He then bequeathed part of his

(*s*) 6 Ves. jun. 567.

personal estate as heir-looms, and gave to his father an annuity, which he charged on his unsettled estates. He then gave several pecuniary legacies, all which he directed should be paid out of his personal estate, (except the part given for heir-looms,) and all the rest and residue of his personal estate, except as aforesaid, he gave to his wife, whom he appointed executrix with the trustees. An observation was made by the Master of the Rolls in this case, that legacies having no existence but by the will, must come out of the fund the testator points out; but debts have a separate and independent existence. He also noticed there being no provision made for *funeral expenses* out of the real estate, on which, however, he did not seem to put much stress, but said, he thought the omission had of late had full as much weight as was due to it.—"Perhaps it is true," he remarked, "as has been stated from Lord Hardwicke, that it is more a phrase of form, than indicating a settled intention, and that either the insertion or omission of it means little. But (he continued) it is argued, that wherever the personal estate is taken to be exempted (whether the whole personal estate, or the residue after charges) it is taken as a *specific* legacy; and, if it is once broken in upon, how is it liable to one charge and not to another? You oppose the construction that it is subject only to particular legacies, by shewing there is something else that must come out of it. In that way the argument is applied from the omission to provide for funeral expenses, and that is the only way in which it has application; for I do not think there is much inference from it as to the intention." He

ultimately decided the personal estate was *not exempt.* The Master of the Rolls noticed in this case, that the trustees and executors were not *wholly* the same persons; where they have been the same, he remarked, that circumstance has been used against the exoneration. In this will, he observed, two of the executors are trustees; but then the wife is added.

In Watson *v.* Brickwood (*t*), a testator devised his freehold and some renewable leasehold estates to W. St. Quintin, his heirs, executors, &c. to certain uses in strict settlement; he then gave to his nieces several legacies in blank, and directed them to be paid at the end of twelve months after his decease by his executor. He then bequeathed to his nephew William Wood, (who was *the first tenant for life of the real estate,*) all his personal estate, he paying thereout all legacies, funeral expenses, and simple contract debts; and reciting that he had, at different times, borrowed money on mortgage and bond to enable him to purchase part of the estates, and being minded that the whole should be discharged in equal proportions by the tenants for life as they should respectively become entitled to his estates, he directed that so much as each tenant for life in possession should discharge, and their respective expenses in protecting his leasehold estates, and a due proportion of any of the two last fines for renewal of the leases, should be a debt and charge against the whole of such estate in favour of such

(*t*) 9 Ves. jun. 447.

person: and he directed the next taker of the estates to repay such sums of money as his predecessor should have so paid off, deducting the due share of such preceding taker; and the same course to be used by each of the takers in succession, before such next taker could have any benefit under his will; and he appointed William Wood sole executor. By a codicil the testator appointed John Birkwood trustee of his will, in the place of St. Quintin, and authorized him, in order to raise money for payment of *all* his debts and legacies, to mortgage a competent part of the settled estates. The executor contended the personal estate was exonerated from the debts, or at least subject only to the simple contract debts. But the Master of the Rolls held there was *no exoneration* of the personal estate.

In Hancox *v.* Abbey (*u*), the testator devised his real estate to trustees, upon trust, to sell so much as would be necessary for discharging a mortgage debt due on part of his estate, and for raising the sum of 2000*l.* for his two daughters, and subject thereto, in trust, for his wife for life, with remainder to his two daughters in fee; and after giving some pecuniary legacies, he bequeathed the residue of his personal estate not otherwise disposed of (after payment of all his just debts, legacies, and funeral expenses,) to his wife absolutely, and appointed her and the trustee executors. The question was, whether the mortgage debt and the legacy of 2000*l.* were payable out of the personal estate. The Master of the Rolls

(*u*) 11 Ves. jun. 179.

was clear that the legacy was specifically charged on the estate. As to the mortgage, he admitted, that a devise to sell for payment of all debts was not an exoneration of the personal estate, for it shewed nothing more than an intention, that all the debts should be paid, and that the real estate, if necessary, should be applied for that purpose; but a direction to apply a particular portion of the real estate for the payment of one particular debt afforded a very different inference, and he decreed that the personal estate ought to be *exempted*.

In the case of Aldridge *v.* Lord Wallscourt (*x*), the facts simply were, that the testator devised his lands (subject to his debts, funeral expenses, and the portions afterwards charged for his daughters and grand-daughters), to trustees on certain trusts, and after limiting the estate to several persons, he directed the trustees, by sale or mortgage, or out of the rents of his lands, to raise the portions therein mentioned, and appointed his son executor, and bequeathed to him all his personal estate for such purpose as the testator should appoint; and by a codicil he appointed the personal estate to one of his daughters absolutely. It was contended the personal estate was exempted from payment of debts; but Lord Chancellor Manners decreed the personal estate was the primary fund.

In Tower *v.* Lord Rous (*y*), a testator devised his

(*x*) 1 Ball & Beatty, 312; *sed vide* Burton *v.* Knowlton, *supra*.
(*y*) 18 Ves. jun. 132.

eal estate (subject to such mortgages and other ncumbrances as affected the same, and to the payıent of his debts and legacies), to trustees for 1000 rears, in trust, to raise 1000*l.* for his eldest daughter ınd to sell certain parts of his real estate, in order o pay off and discharge the mortgages and incumırances on any of his estates, and all his debts (*z*) ınd legacies, and subject to the term of 1000 years, o his first and other sons in strict settlement; and ıfter giving a pecuniary and some specific legacies, ıe bequeathed the residue of his personal estate to ıuch one of his sons as should be his eldest son at he time of his decease, and entitled to the possesıion of the estates under the will. By a codicil he gave part of his personal estate as heir looms, and ›y another codicil he gave certain pecuniary legaːies. The eldest son claimed the residue of the personal estate not specifically bequeathed, disːharged from debts and legacies. The Master of the Rolls observed, it was admitted the funeral and testamentary expenses must be paid out of the perıonal estate, affording the inference, that the testaːor did not mean to give his personal estate as a ıpecific bequest; and he decreed the personal estate was *not exempt*. In this case, the Master of the Rolls is reported to have observed, that the circumstance of the residuary legatee being the first taker of the real estate, had been sometimes held a ground for *exempting the personal estate;* we have however seen, that the circumstance alluded to has generally

(*z*) *Vide* Hancox *v.* Abbey, *supra;* and note the difference.

produced a contrary effect, in which light it was considered by Lord Eldon in the case we are about to notice.

In Bootle *v.* Blundell (*a*), many of the circumstances concurred which had passed under consideration in the prior cases. The will commenced with general directions that the testator's funeral expenses should be paid. He then gave to his son and two daughters legacies of 3000*l.* each; and directed that his *funeral expenses* and the said legacies should be paid out of such monies as he should have by him at the time of his death at Ince, or in the Liverpool Bank, or should be due to him from the corporation of Liverpool, and out of such rents and fines as should be then due to him; and he gave the surplus of that fund to his said son and two daughters. He then devised certain estates at Lostock to trustees, for five hundred years, upon trusts, *out of the rents and profits*, to raise money for payment of *debts*, and all such annuities and legacies as were thereafter mentioned; and amongst the rest 300*l.* to his trustees; and he *charged* the expenses of his trustees and executors on those estates; and subject to the term, devised those estates to his two daughters, in undivided moieties, in strict settlement; and gave out of the rents a legacy of 300*l.* to any future trustees. He then devised his Lydiate estate to his son for life, with remainders over in strict settlement, and gave his pictures, statues, and marbles, as heir-looms, to go with the last-mentioned estates; but he request-

(*a*) 1 Mer. 193.

ed that no servant might be allowed to take any perquisite for shewing them. He gave his housekeeper certain specific articles, which he directed to be removed at the expense of his personal estate; and then gave to his son the furniture of his house, his wines, horses, cattle, and carriages, plate, and other his goods and chattels, and personal estate, *not thereinbefore by him specifically disposed of*, or which might be thereafter disposed of by him, and appointed the trustees executors. By a codicil, he devised to the same trustees a term of 1000 years in the Lydiate estate, in trust to raise any sums of money they might expend in supporting the will.

By a decree made by the Lord Chancellor, in April, 1815, the legacies of 3000*l.*, and the *funeral expenses*, were declared to be specific charges on the monies at Ince, or in the Liverpool Bank at the testator's death, or due to him from the corporation of Liverpool, or for rents or fines, and that the surplus of that fund was a *specific bequest* to the son and two daughters: That the bequest of furniture, &c., and other personal estate, not specifically disposed of, was not to be considered a specific bequest to the son of those several articles, but formed part of the general residue; and that the personal estate, not specifically disposed of, was the primary fund for payment of debts, and the term of five hundred years an auxiliary fund, to make good the deficiency. It was now moved, that the minutes should be altered, by declaring the term of five hundred years the primary fund, in exoneration of the personal estate.

All the circumstances in the case were separately considered by the Chancellor. He first remarked on the same persons being *trustees and executors*, which had been called by some judges a circumstance shewing the intention not to exempt the personal estate; but his Lordship said, that, on the contrary, whether it was or was not such a circumstance, depended entirely upon the context; and if he could discover through the whole will an anxious discrimination between the two characters in which they were to take; if he could trace an extreme caution, that all their costs contained in the character of executors were to be paid to them, not as executors, but as trustees of the real estate, then he must conclude, that in a will so constituted, the inference of intention arising out of the union of character, failed by reason of a stronger inference of a contrary intention. He next remarked, that some judges had considered a direction that the *funeral expenses* should be paid out of the real estate, a strong circumstance to exonerate the personal, because it was not reasonable to suppose the testator could have meant to exempt it from that which is the primary charge upon it, and yet leave it subject in all other respects to the natural course of law, while othe judges had professed not to see much in that argu ment, and that the circumstance went no further meaning, than it did in words, to create a fund f one particular class of expenditure. All these s posed positive inferences then, observed his l ship, amount to no more than this, that the s expressions used in one will, may have a totally ferent effect from what they would have in anot

His Lordship then went through a review of the cases, and observed, that the cases of Stephenson *v.* Heathcote, and Ancaster *v.* Mayer, furnish the concurrent opinion of Lord Northington and Lord Thurlow, that if, in the first of those two cases, the wife had *not been appointed executrix*, she would have taken the personal estate *exempt* from the payment of debts. He also expressed his opinion, that the case of Watson *v.* Brickwood was rightly decided, taking the will and codicil together.

He then considered the facts of the principal case, and remarked, that it was observable the testator throughout the will never used the term *executors* but with reference to his personal, nor the term *trustees* but with reference to his real estates.

He next noticed the fact of the funeral expenses being directed to be paid out of a specific fund, although, generally speaking, the personal estate constituted a primary fund for such purpose. He then adverted to the trusts of the term of five hundred years, viz. out of the *rents and profits* to pay debts, and the legacies thereinafter given, observing, that the legacies to the *executors* could only be payable out of the real estate, a circumstance worthy of particular attention. He then noticed, that it was evident the legacies were to be raised forthwith, and not out of annual rents, and it was a fair inference, he contended, by making a provision for debts and legacies in one clause, they should be both paid in the same way.

He then adverted to the clause charging the costs of *his trustees and executors* on the Lostock estate, and remarked, that the expenses incurred by them in the performance of the trusts of the real estate, could not be charged on the personal estate: and that from the case of both real and personal estates being blended, it was a strong argument the testator intended the whole should be a charge on the devised estate, in exoneration of the personal.

He afterwards observed on the legacy of 300*l.* to *future trustees*, from which it might be inferred, that the legacies to the *trustees and executors* were given to them in the capacity of trustees.

He then remarked on the gift of the pictures, &c., as heir-looms, and observed that the view with which the clause was introduced, viz. the keeping them together as public curiosities, sufficiently accounted for their being set aside from the rest of the personal estate, without resorting to the supposition that it was merely to exempt them from the payment of debts and legacies, to which it would then follow of course the remainder of the personal estate was meant to be liable.

He then considered the directions in the will that the costs of removing some of the specific legacies should be borne out of the personal estate, but said it did not thence follow, as had been argued, that the personal estate was to be subject beyond that charge to the payment of debts and legacies.

He then proceeded to the clauses giving to the son the personal estate, not specifically disposed of.

He first noticed the distinction taken by his predecessors, between a residue given simply, or following an enumeration of articles constituting items of such a description as to render it improbable the testator meant them to be applied in payment of debts, which he thought was a circumstance deserving of just so much weight, and no more, as any individual judge could consider it fairly entitled to: He also noticed the circumstance of the residuary legatee being also tenant for life of the devised estates, with remainder over to his children, which had been considered as a reason why it could *not* be intended he should take the personal estate exempted from debts, which circumstance his lordship thought must depend for its weight on a consideration of the whole will, for after all, he observed, the question was not what the testator really meant, which could never be ascertained, but what he had authorized the Court to say probably was his meaning. He then observed on the words "not hereinbefore specifically bequeathed," which at first occurred to him as excluding the idea of this being a specific bequest; but that inference was not a necessary one, for the expression might mean "not specifically bequeathed to others." He then remarked on the 1000 years' term for securing the costs of his trustees and executors in supporting the will; And on all these grounds declared, that after all the attention he had been able to give the case, he felt convinced the testator did *not* intend his personal estate *to be subject to debts*.

In Gittins *v.* Steel (*b*) the general personal estate was, under the circumstances, held to be exempted from the payment of a particular legacy charged by the testator on his freehold and leasehold estates, but which proved insufficient for its payment.

In the case of Rhodes *v.* Rudge (*c*), the testator gave all his real and personal estate to trustees, upon trust, *in the first place*, to sell his living of Crayford, and to apply the produce in payment of his debts and legacies, and the costs of the trusts created by his will, and if not sufficient for the purpose, then to fell timber on his real estate to the amount of 500*l.*, to be applied in discharge of his debts and legacies; and if this fund was not sufficient, then to raise the deficiency by mortgage of his real estates. The testator then gave several pecuniary legacies, and devised his real estates in strict settlement. He lastly appointed the trustees executors of his will, and authorized them to deduct and retain their expenses.

The testator made no express declaration of trust of his personal estate, which (the case being prior to the 1 Will. IV. cap. 40,) was claimed by the executors beneficially, and who further contended that it was exempt from debts and legacies. The Vice Chancellor decided that the executors did *not* claim beneficially, and that the personal estate was *not* exempt.

In the case of Dawes *v.* Scott (*d*), the testator, by his will, devised his estate at Highbury as therein

(*b*) 1 Swanston, 24. (*c*) 1 Sim. 79. (*d*) 5 Russ. 33.

mentioned. By a subsequent will he confirmed his prior will, and devised an estate at Charleywood, and various articles of personalty, to trustees, upon trust to sell and pay debts, funeral expenses, and legacies, and gave the surplus to his brother; and declared this fund should be primarily liable to debts, &c. He then devised an estate in Westmoreland in strict settlement, and bequeathed several articles of plate as heir-looms, and gave the residue of his real and personal estate to his brother absolutely.

By a codicil he declared that the charges on his Highbury estate should be paid out of the produce of the sale directed by his will, and if the monies from such sale should be insufficient to discharge his debts, &c., including the charges on the Highbury estate, he charged the Highbury estate with the deficiency. It was decided that the Highbury estate was the secondary fund, in *exemption* of the personalty given to the brother.

In the case of Blount *v.* Hipkins (*e*), the testator gave various articles of personalty by name, and his personal estate and effects of every kind (*except* his gold watch, riding horse, bridle, saddle, and wearing apparel, and certain canal shares,) and certain portions of his real estate, to his wife absolutely. He then disposed of the excepted articles of personalty to two different persons, and devised to a trustee all the residue of his real estate, upon trust to sell, and out of the produce pay his funeral expenses and debts, including the mortgages on the

(*e*) 7 Sim. 43.

estates devised to his wife, and certain sums to several persons therein named, and the surplus to his natural son, and appointed his wife executrix. By a codicil he made some alterations in the disposition of different articles, but which did not affect the general arrangement of his property. It was declared that the personal estate *was exempt*.

The preceding cases (*e*) will evince the difficulty, as before observed, of drawing any general rules to guide our judgment in questions which arise relative to the exemption of the personal from its liability to exonerate the real estate from debts. The ground taken by Lord Eldon, and adopted by subsequent Judges, seems to have been, that although certain circumstances, such as the trustees and the executors being the same, or being distinct persons; the bequest of the personal estate being entire, or as a residue; and, if the latter, its following immediately an enumeration of specific articles not likely to be intended by the testator to be sold, or the like, may have more or less weight on the mind of the judge deciding the question; yet the presumption arising from all or any of such circumstances, whether for or against the exemption of the personal estate, is open to be rebutted by an attentive consideration of the contents of the whole will; and that no particular circumstances of themselves are of such sufficient force as imperiously to require our admission of the intention of the testator, without being subject to be explained or rebutted by other parts of the will. The evidence of such intention is, however, in

(*e*) See also 1 Eden, 47, note, where many of the cases on this subject are collected.

all cases, to be gathered from the will itself, and not from circumstances *dehors* the will (*f*).

In applying the principle of the primary liability of the personal estate for the payment of debts to the particular case of mortgage, it is necessary to remark, that it will not prevail to the prejudice of legatees, whether specific (*g*) or pecuniary (*h*), and much less to the prejudice of creditors (*i*), and it is decided, that the paraphernalia of the widow are also exempted (*k*). The rule is, in fact, applicable between the heir and devisee on the one hand, and the executor or administrator and residuary legatees or next of kin, on the other, but not as between other parties; and therefore, if the mortgage creditor resorts to the personal estate, and by such means exhausts the fund, the other creditors and the legatees will have relief in equity on the real estate in mortgage, or, in other words, equity will marshal the assets for their benefit.

The mortgage will be payable out of the personal estate in preference to the customary or orphanage part by the custom of London (*l*), and to the widows' customary moiety in the province of York (*m*).

(*f*) Gittings *v.* Steel, 1 Swanst. 24.
(*g*) O'Neale *v.* Mead, 1 P. Wms. 693.
(*h*) Davis *v.* Gardner, 2 P. Wms. 190; Rider *v.* Wager, *ibid.* 335.
(*i*) Bartholomew *v.* May, 1 Atk. 487.
(*k*) Tipping *v.* Tipping, 1 P. Wms. 730.
(*l*) Ball *v.* Ball; cited in Rider *v.* Wager, *supra.*
(*m*) Pockley *v.* Pockley, 1 Vern. 36.

After the personal estate is exhausted, it is necessary to consider in what order the *real estate* may be applicable for the discharge of mortgage debts.

It is of course competent to a party raising money by mortgage and comprising several distinct estates in one deed, to declare, that as between these estates one or more of them shall be primarily liable in relief of the others. As in a case in which an estate was purchased under the order of the Court of Chancery, and the purchaser offered to secure the purchase-money on an old estate of his own, and, as a collateral security, on the newly-purchased estate. And accordingly the old estate was first demised, and then, in the same deed, the new estate was also demised by way of collateral security to the mortgagee. The estate afterwards passed to different parties, claiming through the mortgagor, and it was decided that the old estate was primarily liable to the mortgage debt (*n*).

In the case of Serle *v.* St. Eloy (*o*), a man seised of lands in fee, *part of which* were in mortgage, devised his lands in mortgage to his niece (an infant), in fee, *subject to the incumbrances thereon.* He then devised other lands to his brother in fee, *subject to the payment of debts,* and he devised the residue of his real and personal estate to Mr. St. Eloy, *in trust to sell and thereout pay his debts* and legacies, and should any of his debts remain unpaid, he charged

(*n*) Marquis of Bute and another *v.* Sir W. Cunynghame and others, 2 Russell, 273.

(*o*) 2 P. Wms. 386.

the same on the estate devised to his brother, and appointed Mr. St. Eloy his executor.

The infant, by her bill, submitted to pay off the mortgage. The Master of the Rolls said, that the devise of the estate in mortgage, *subject to the incumbrance*, was no more than what was implied, for the testator could not do it otherwise; but when the testator devised other estates to pay his debts, this must be intended *all his debts*, and consequently the debt by mortgage was part of those debts which were to be paid off out of the money arising by sale of the trust estate, and he ordered the plaintiff to amend her bill. On the amended bill coming on to be heard, the Master of the Rolls declared, that the debts and legacies were to be paid out of the personal estate, and out of the real estates devised to *St. Eloy and the testator's brother*, and that the mortgage debt was to be taken as one of those debts. Against this decree, the brother appealed, but the judgment was affirmed by Lord Chancellor King.

By this case several important points were determined; first, that the devisee of an estate in mortgage has a right to call on an *estate devised for payment of debts*, to indemnify him (*p*). Secondly, that he has a like claim on estates devised *charged* with the payment of debts. And, thirdly, that it does not lessen his equity if the estate in mortgage be devised *subject to incumbrances*.

(*p*) *Et vide* Tweedale *v.* Coventry, 1 B. C. C. 240; Bateman *v.* Bateman, 1 Atk. 421; Howell *v.* Price, 1 P. Wms. 291.

In a subsequent case before Lord Hardwicke (*q*), all the points appear to have arisen which occurred in Serle *v.* St. Eloy, and the like decree was made.

A question next arose (*r*) between the devisee of the estate in mortgage and the *heir at law,* in respect of an estate descended. A testator devised his real estate to his wife in fee; he afterwards purchased other estates, which descended on his heir at law; the devised estate was in mortgage, and the question was, whether the descended estates should be applied in exoneration of the devised estate. At the first hearing of the cause Lord Hardwicke thought the devisee must take *cum onere.* On a rehearing his lordship adjourned the case to look into entries of judgments at law on the statute of fraudulent devises, and for precedents in equity, where there were specialty debts and mortgaged estates devised. After a twelvemonth's delay he gave an elaborate judgment. He first observed, that at common law the heir could not have called on a devisee even to contribute towards the payment of specialties. He then considered the effect of the statute of fraudulent devises, and came to the conclusion, that this statute was passed for the benefit of creditors, and not in favour of heirs at law. He next noticed the decisions in favour of the devisee of the mortgaged estate as against the personalty; and afterwards adverted to the case of Serle *v.* St. Eloy, as being the nearest in point to the present case. He then reversed his former decree *in toto,* and directed an account to be

(*q*) Bartholomew *v.* May, 1 Atk. 487.

(*r*) Galton *v.* Hancock, 2 Atk. 424—427.

aken of the real estate descended upon the heir, vhich was to be applied in exoneration of the devised estate. By this case a fourth point was decided, *viz.* hat the estate *descended* should exonerate the *mort-gaged estate devised.* And the like will be the case, f the testator exempts his personal estate from the ayment of debts, and devises his mortgaged estates *ubject to incumbrances,* and permits other part of his eal estate to descend on his heir at law (*s*).

The last-mentioned rule applies as between the levisee of the mortgaged estate and the heir at law: out a distinction was taken by Lord Hardwicke in Powis *v.* Corbet (*t*), in favour of the heir at law, in case part of the real estate be *expressly* devised for the payment of debts. In that case part of the estates had descended on the heir at law, and other parts were devised to trustees for a term of five hundred years, *in trust for payment of debts,* with remainders over, and it was determined, that a particular trust being created out of particular lands for the payment of debts, that fund must be first applied before the *descended* estate could be liable. This decision has been supported by subsequent cases (*u*). The consequence is, that after the personal estate is exhausted, estates expressly devised for payment of debts will be next applicable.

The last-mentioned distinction, however, will not apply to estates specifically devised *charged* with the payment of debts. This was decided in the case of

(*s*) Barnewall *v.* Lord Cawdor, 3 Madd. 453.

(*t*) 3 Atk. 556.

(*u*) Davies *v.* Topp; Donne *v.* Lewis; Manning *v.* Spooner, *infra.*

Davies *v.* Topp (*x*). In that case the testator being seised of real estate subject to a mortgage, by his will charged all his real and personal estates with the payment of debts; subject to which he devised his real estates in strict settlement. He *afterwards* purchased a freehold estate, which, on his death, descended on his heir. The bill was for an account and for the application of the personal estate in a due course of administration, and to have the deficiency raised out of the real estate. The cause was first heard at the Rolls, when the Master directed that the deficiency of the personal estate for payment of the mortgage and other specialties, should in the first place be made good out of the estates descended. The heir at law appealed to the Lord Chancellor. For the devisee, the case of Galton *v.* Hancock was cited. For the heir at law, the case of Powis *v.* Corbet. On the hearing of the cause, Lord Thurlow said, it was impossible to distinguish the case from Galton *v.* Hancock (*y*); the first fund for the payment of debts was the personal estate; the second fund might be estates devised for payment of debts; and the third fund, estates descended, but estates *particularly devised* were never applied till all the other funds were exhausted. And he affirmed the decree.

A similar decision had been made in a prior case (*z*), but the point does not appear to have been raised by the pleadings.

(*x*) 1 B. C. C. 524. (*y*) *Supra.*

(*z*) Wride *v.* Clarke, cited 2 B. C. C. 261.

In the case of Donne *v.* Lewis(*a*), a review was made by Lord Thurlow of the preceding decisions. In that case the testator gave all his real and personal estate, (except the estates afterwards specifically devised,) to trustees, in trust to pay debts, &c., and declared, that if the fund so provided should not be sufficient, then he charged the deficiency on the estates given to his three sons and two daughters, and directed that one-fifth, with interest at *5l. per cent.* should be borne by each. He afterwards purchased a small freehold estate, and the question was raised, whether the descended estate should be applied in preference to the estate specifically devised. The Chancellor first remarked, that if the case of Galton *v.* Hancock were more recent, he should not perfectly agree that there ought to be the distinction which appeared to have been taken in Davies *v.* Topp, and Wride *v.* Clarke, between a general charge created by general introductory words, and a charge created by the most express aad specific words that could be used for subjecting property to the payment of debts. He next noticed a distinction taken in Powis *v.* Corbet, between an estate in the testator's possession at the time of making his will, and which he permits to descend on his heir at law, and a subsequently acquired estate, a circumstance which he did not think substantial enough to raise a distinction in a case where you must hold the subject-matter as a thing quite out of the scope of the testator's intention. He then stated the order of payment as in Davies *v.* Topp, *viz.* First, The general personal estate; Se-

(*a*) 2 B. C. C. 257.

condly, Ordinarily speaking, the estates devised for payment of debts; Thirdly, Estates descended; Fourthly, Estates specifically devised, even though they are generally charged with the payment of debts. He then referred to the decided cases, and said, "the question will always be, *are the terms of the will only a general indication that the testator means to subject his property to his debts, or does he mean more, and to make a particular provision for them?*" In the principal case, he thought the latter was the testator's intention, and accordingly decided that the devised estates were to be first applied.

In the case of Manning *v.* Spooner (*b*), the descended estate was purchased subsequently to the will, which contained a devise of estates in the West Indies to trustees in fee, in trust to manage, &c. and out of the profits to pay certain annuities, and in the next place, to apply the profits in payment of debts so far as his personal estate should be deficient, and subject to those trusts, to uses in strict settlement. For the devisees it was urged, that the circumstance of the descended estate being purchased after the date of the will, was material to shew the testator's intention, that it was not to be exempt. For the heir at law, it was argued, that the inference, from the circumstance of the will not being republished, was as strong in favour of the heir as the descended estate had been purchased at the date of the will. The Master of the Rolls adverted to the doctrine laid down by Lord Thurlow in Dorr

(*b*) 3 Ves. 114.

Lewis as before stated, and decided that the descended estate could not be applied until the appropriated estate was exhausted; but the arrangement could not affect the rights of creditors.

The decided cases have therefore now determined that there are four classes of estates to be applied in discharge of mortgage debts: first, the general personal estate, unless specially exempted; secondly, estates particularly devised for payment of debts: thirdly, estates descended, whether purchased before or after the date of the will: and fourthly, estates specifically devised, charged with the payment of debts (*b*).

A general charge of legacies on real and personal estate will not render real estates *specifically* devised liable to legacies (*c*), in case of a deficiency in the personal estate.

We must next proceed to the second branch of inquiry, viz. the cases on which no question has been made as to the application of the general rule, that the personal estate is the primary fund for the payment of the mortgage debt; but the doubt has been whether the loan was the proper debt of the party. Of this, an instance has been already given in the modern case of Scott *v.* Beecher (*d*).

First, in the case of a *purchaser*. If a man pur-

(*b*) *Et vide* 3 & 4 Will. IV. c. 104.
(*c*) Spong *v.* Spong, 3 Bligh, 84. (*d*) *Supra*, page 544.

chase an estate subject to an existing mortgage, the debt does not, without more, become *his* debt, so as to render him personally liable to the mortgage; the land remains the proper fund for its discharge; and it will require clear evidence of intention on the part of the purchaser to make the debt *his own*, so as to render his personal estate the primary fund for payment. Now every person purchasing an estate in mortgage is bound to indemnify the vendor against the mortgage debt (*e*), and as a covenant by the purchaser with the vendor for the payment of the debt is no more than a covenant of indemnity, it consequently is no indication of intention on the part of the purchaser, that his personal estate shall become the primary fund for its discharge (*f*); nor under such a covenant is the purchaser or his executor liable to an action at law by the *mortgagee* (*g*); and if the purchaser, by his will, create a trust or charge for the payment of *his* debts, it will not (under such circumstance) include the mortgage debt (*h*). If, however, a purchaser *borrow* a sum of money to enable him to complete his contract, and the estate is on the purchase limited to the lender, either for a term of years or in fee by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an

(*e*) *Vide* 7 Ves. 336.

(*f*) Tweddell *v.* Tweddell, 2 B. C. C. 101.

(*g*) *Ibid.* Forester *v.* Leigh, Amb. 171; Butler *v.* Butler, 5 Ves. 534.

(*h*) Ancaster *v.* Mayer, 1 B. C. C. 454; Butler *v.* Butler, *supra*.

existing mortgage (*i*). If such be not the purchaser's intention, he should insert in the deed of mortgage a declaration, that as between his real and personal representatives the land shall be the primary fund, and his personal estate an auxiliary fund for payment of the mortgage debt; but that such agreement is not to prejudice the rights of the mortgagee.

A distinction is said to exist between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case, it is considered, the personal estate of the purchaser will be the primary fund. For this, the case of Parsons *v.* Freeman (*k*) is cited as an authority, in which a man contracted to pay 90*l.* for an estate, viz. to pay 86*l.* to the mortgagee, and 4*l.* to the vendor. Lord Hardwicke held the personal estate was primarily liable, on two grounds; first, because there was an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money (*l*). Secondly, it being agreed to be *part of the purchase-money*, the heir would (if there was nothing more in the case) be entitled to

(*i*) Waring *v.* Ward, 5 Ves. 670; 7 Ves. 332.

(*k*) Amb. 115; 2 P. Wms. 664, note; Belvidere *v.* Rochfort, 5 B. P. C. 299.

(*l*) Cope *v.* Cope, 2 Salk. 449.

have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed (*m*). This distinction, however, appears rather refined. The argument drawn from the right of the heir at law in the latter case, to call on the personal estate to pay the whole purchase-money, in case the purchaser dies without completing the contract, does not seem to be very strong, for it is a simple question of evidence of *intention:* now if the purchaser dies without completing the contract, having agreed for the purchase of the *whole estate,* it may be fairly contended on the part of the heir, that his ancestor's intention was to pay off the mortgage, and purchase the entire estate, and therefore he may reasonably call on the personal estate to discharge the mortgage in his favour. But if the purchaser himself completes the contract, permitting the mortgage to remain, then the weight of evidence of intention is exactly the reverse; and one would think should lead to precisely different conclusions. As to the express contract to pay the whole sum, that agreement *has been manifestly* varied by the acts of the parties qualified to do so. To prevent, however, any doubt, the purchaser should (if such be his intention) make a declaration similar to that before recommended in the instance of his *borrowing* money to pay off the mortgage.

Another point of considerable magnitude arises in our consideration of this branch of our subject, viz. supposing the purchase to be of a mere equity of re-

(*m*) *Et vide* Cope *v.* Cope, *supra.*

demption, what degree of evidence will be sufficient to indicate the purchaser's intention to make the debt his own? We have seen that, generally speaking, a covenant with the vendor for payment of the debt will not have that effect, it being no more than a covenant of indemnity. In a more recent case, however, a covenant of that nature was, with other circumstances of rather a peculiar nature, held sufficient for the purpose (*n*). The facts were, that Richard Huntingford and wife being tenants for life, and their son John being tenant in remainder in fee, of certain lands, they all joined in a demise to a mortgagee for a term of years to secure a sum of money raised for the benefit of John. The father and John covenanted for payment of the mortgage debt. A further sum was afterwards advanced, for the payment of which they also covenanted. Consequently both father and son became liable to an action at law by the mortgagee for the money. The interest being greatly in arrear, John agreed to convey his remainder in fee to his father, on the latter indemnifying him against the debt, which was accordingly done. The father afterwards borrowed a further sum, and made a fresh mortgage for the whole debt. Under these special circumstances, the Master of the Rolls decided that Richard Huntingford had made the debt his own, and consequently his personal estate was the primary fund for discharge of it.

In the last-mentioned case it will be observed that

(*n*) Woods v. Huntingford, 3 Ves. 128.

there was not only a covenant of indemnity from the father to the son, but the former was actually liable on his covenant at law to the mortgagee, and he afterwards entered into a *fresh agreement* altogether with the mortgagee for the payment of the original debt, and of the further sum advanced. On the latter principle, viz. of the agreement between the purchaser and the mortgagee being *de novo*, the case of the Earl of Oxford *v.* Lady Rodney (*o*), appears to be decided. In that instance, one Nicholl being possessed of the equity of redemption in a house in Harley Street, sold the equity of redemption to Lord Oxford, in consideration of 1360*l.*, subject to a mortgage of 2100*l.* to Mr. Wilbraham. Wilbraham was a party to the conveyance, and covenanted that if Lord Oxford paid the 2100*l.* with interest, on certain days and in certain proportions *mentioned in the purchase deed*, he would re-assign the premises; and Lord Oxford covenanted that he would pay the debt accordingly. It was held that Lord Oxford's personal estate was the primary fund. In another modern case (*p*), the circumstances were more special than in Lord Oxford *v.* Lady Rodney. An estate was sold by order of the Court of Chancery to Mr. Waring for 32,000*l.* The estates were in mortgage for 17,800*l.* The purchaser paid 12,000*l.* into Court, and borrowed 20,000*l.* from Sir R. Cunliffe, which was also paid into Court. The mortgage debt was then paid off out of the fund in Court, and all the parties concurred in a conveyance to Sir R. Cunliffe

(*o*) 14 Ves. jun. 417.

(*p*) Waring *v.* Ward, 5 Ves. 670; 7 Ves. 332.

in fee, subject to redemption. It was contended that the land was the primary fund for the amount of the money borrowed, or at least of the money paid in discharge of the original mortgage, but the Court decided that the whole debt should be paid out of the personal estate of the purchaser, on the ground that the transaction was a personal contract between Waring and Cunliffe.

It is suggested that these cases do not bear out the doctrine, that, if the purchaser by *any communication* with the mortgagee take the debt upon himself so as to give the mortgagee a right to sue him for the mortgage debt at law, he will be considered to have made the debt his own; and that as between his real and personal representative, his real estate will be only the auxiliary fund for payment. All the three cases of Woods *v.* Huntingford, Waring *v.* Ward, and Lord Oxford *v.* Lady Rodney, had strong circumstances evidencing the purchaser's intention to consider the debt his own, but it is submitted, that it yet remains to be decided, that a mere covenant by a purchaser with a mortgagee to pay the debt, without any alteration of the time of payment or any other variation of the original contract, will operate to render the personal estate of the purchaser the primary fund.

Secondly: in the case of an *heir at law or devisee.*

If an estate descend on an heir at law (*q*), or be

(*q*) Cope *v.* Cope, 2 Salk. 449; 1 Eq. Ca. Ab. 270; Evelyn *v.* Evelyn, 2 P. Wms. 664.

devised (*r*), charged with a mortgage debt, and the heir or devisee die leaving the mortgage debt unpaid, the land will be the fund for the payment of the debt. Of this the before-mentioned case of Scott *v.* Beecher (*s*) is a strong instance, for, in that case, the devisee was also the sole legatee, and the personal estate of the mortgagor after payment of debts, &c. was sufficient to have discharged the mortgage; and yet on a bill filed by the heir at law of the devisee against the administrator of the devisee, to be indemnified out of the personal assets of the mortgagor, his claim was refused. The case of Scott *v.* Beecher seems to have been decided on sound legal principles, and brings into question a position in Gilbert's Lex. Præt. 315, viz. that if father be heir and executor to grandfather, and the grandfather leave assets to the value of the mortgage debt, and the father convert the assets to his own use, the father's personal estate to the amount of the assets converted will be liable to the payment of the grandfather's debt, and the grandson may, in such case, come upon his father's executors to that extent, to exonerate the mortgage out of the father's personal estate. It is submitted that the grandson would have no more equity in the case put than the heir of the devisee in Scott *v.* Beecher. The case of the Earl of Belvidere *v.* Rochfort (*t*) certainly appears to support the position in Gilbert, but in

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(*r*) Perkins *v.* Bayntun, 2 P. Wms. 664, note; Shafto *v.* Shafto, Basset *v.* Perceval, *ibid;* Scott *v.* Beecher, 5 Madd. 96.

(*s*) *Supra*, p. 541. (*t*) 5 B. P. C. 299.

Tweddell *v.* Tweddell (*u*), Lord Thurlow expressed his dissent from that decision, and many different reasons being stated for affirming the decree appealed against, the case does not seem to have been much relied on as an authority (*x*). In another case in which part of a testator's real estate was, by act of parliament, expressly set aside for the payment of the testator's debts, and the heir disposed of that fund, and converted the money to his own benefit, his personal estate was held primarily liable to the payment of the debts (*y*).

In matters of this sort, the question is confined to evidence of *intention;* and therefore, as on transfer or assignment of the mortgage, the concurrence of the heir or devisee in the deed, and his personal covenant for payment of the money, is only by way of additional security to the mortgagee, the burden of the debt will not, as between the real and personal representatives, be altered (*z*). The same principle applies if other estates are added to the security, on a further sum being lent (*a*), or if there be a covenant on his part for increasing the rate of interest (*b*); and it seems that if the sums borrowed by the heir or devisee, and added to the original mortgage, be comparatively small, equity will not consider that he

(*u*) 2 B. C. C. 107. (*x*) *Vide* 2 B. C. C. 105.

(*y*) Effingham *v.* Napier, 5 B. P. C. 221; 2 P. Wms. 664, note.

(*z*) Bagot *v.* Oughton, 1 P. Wms. 347; Evelyn *v.* Evelyn, 2 P. Wms. 659; Leman *v.* Newnham, 1 Ves. 51, *et vide* 7 Ves. 336.

(*a*) Ancaster *v.* Mayer, 1 B. C. C. 454, 464.

(*b*) Shafto *v.* Shafto, 1 Cox, 207; 2 P. Wms. 664, note.

had different intentions as to the different sums, but will charge the real estate with the whole (*c*). It is, perhaps, unnecessary to add, that the latter doctrine must be received with much caution. In a case before Lord Northington (*d*) his lordship is said to have given an opinion that if, on a transfer of mortgage, *a new equity of redemption* is created, the personal estate of the heir will, on his death, become the primary fund. But this opinion seems to be at variance with several well-considered cases, and must, it is submitted, be confined to instances in which, from the circumstances attending the case, an evidence of such an *intention* can be collected.

The same rule applies to the heir or devisee as to a purchaser (*e*), viz. that a charge by his will of debts generally on his real and *personal* estate will not of itself be sufficient to shift the onus from the mortgaged estate (*f*).

Even a direct and original mortgage made by the heir or devisee will not operate to render his personal estate the primary fund, if the money borrowed is for the purpose of paying off the debts (*g*) or lega-

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(*c*) Lewis *v.* Nangle, Amb. 150; 2 P. Wms. 664, note.

(*d*) Donisthorpe *v.* Porter, 1 Eden, 162; Amb. 600.

(*e*) *Supra*, p. 578.

(*f*) Lawson *v.* Hudson, 1 B. C. C. 58; 3 B. P. C. 424; Hamilton *v.* Worley, 2 Ves. jun. 62; 4 B. C. C. 199; Leman *v.* Newnham, 1 Ves. 51; Butler *v.* Butler, 5 Ves. 534; Ancaster *v.* Mayer, *supra*.

(*g*) Tankerville *v.* Fawcett, 1 Cox, 237; 2 B. C. C. 57; Perkins *v.* Bayntun, 2 P. Wms. 644, note.

cies (*h*) of the ancestor or devisor, and the like will be the case if the heir or devisee give his bond (*i*) or note of hand (*k*) for payment of debts or legacies charged on the land.

Thirdly: in the case of a *surety*.

In many instances, persons are concurring parties in a mortgage, or assignment of mortgage, in the character of *sureties*. For instance, if a man having a power to charge an estate with a sum of money, raise it by way of mortgage, and on an assignment of the mortgage the person then entitled to the estate is a party, and gives his personal covenant for payment (*l*); the covenant will operate as an auxiliary security only, and the land must bear the onus: or, if a person having an estate in lands, concur in a mortgage with some other party having also an estate in the lands, for the purpose of raising a sum of money for the benefit of the latter, he is merely a surety, and may require to have the estate exonerated out of the assets of the other party; and it is said, if he enter into no covenant, that he will not be personally liable to the mortgagee either by way of specialty or simple contract (*m*).

(*h*) Basset *v.* Perceval, 1 Cox, 268; 2 P. Wms. 664, note; Mattheson *v.* Hardwick, 2 P. Wms. 665, 5th edition; Billinghurst *v.* Walker, 2 B. C. C. 604; Hamilton *v.* Worley, *supra*.

(*i*) Billinghurst *v.* Walker, *supra*; Basset *v.* Perceval, *supra*.

(*k*) Mattheson *v.* Hardwick, *supra*.

(*l*) Evelyn *v.* Evelyn, 2 P. Wms. 664; *et vide* Lechmere *v.* Charlton, 15 Ves. 193.

(*m*) Lloyd *v.* Thursby, 2 Cru. Dig. 163, 2d edit., *sed quære* as to the latter.

If a bond is given by principal and surety, and at the same time a mortgage is executed by the principal debtor for securing the debt, the surety paying off the bond debt will be entitled to stand in the place of the creditor, in respect of the mortgage (*n*).

On the principle of suretyship rest the cases in which it has been decided, that if a settlor covenant for payment of children's portion, or widow's jointure (*o*), or if a person make a voluntary gift by way of charge, and covenant for payment of the money (*p*), the land must be the primary fund for payment.

A very distinct class of cases has arisen in the consideration of mortgages by husband and wife, of the estate of the latter; the question in those cases being, whether the estate of the husband was, under the circumstances of each case, bound to indemnify the estate of the wife against the mortgage. The distinctions taken in this branch of the law are clear and satisfactory.

The general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to

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(*n*) Copis *v.* Middleton, 1 Turner & Russell, 231.

(*o*) Lanoy *v.* Duke of Athol, 2 Atk. 444; Edwards *v.* Freeman, 2 P. Wms. 438; Coventry *v.* Coventry, 2 P. Wms. 222; *et vide* Lucy *v.* Gardiner, Bunb. 137.

(*p*) Wilson *v.* Darlington, 1 Cox, 172; 2 P. Wms. 664, note.

come to his use, and this throws the proof to the contrary on him (*q*).

If the money be raised for the benefit of the husband, the wife or her heir will be a creditor in the place of the mortgagee, on his estate to the amount of the debt discharged out of her estate (*r*); and will have preference to all legatees of the husband (*s*), but will be postponed to all his creditors (*t*), who however, on the other hand, will not, it seems, in case the mortgagee resort to the husband's estate, have a right to stand in his place as creditor on estate of the wife (*u*).

Parol evidence is admissible, to shew for whose benefit the money was raised (*x*).

If it be raised by the husband to pay off debts of his wife incurred *dum sola*, the wife's estate must bear the burden (*y*); and the like, it seems will be the case, if the principal part of the money

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(*q*) Per Lord Chancellor Hardwicke in the Earl of Kinnoul *v.* Money, 3 Swanst. 208, note.

(*r*) Huntingdon *v.* Huntingdon, 2 Vern. 436; 2 B. P. C. 1; Pocock *v.* Lee, 2 Vern. 604; Tate *v.* Austin, 1 P. Wms. 264; Parkeriche *v.* Powlett, 2 Atk. 384; Astley *v.* Tankerville, 3 B. C. C. 545; Lacam *v.* Mertins, 1 Ves. 313; Clinton *v.* Hooper, 1 Ves. jun. 173; 3 B. C. C. 201.

(*s*) Tate *v.* Austin, *supra.* (*t*) *Ibid.*

(*u*) Robinson *v.* Gee, 1 Ves. 252.

(*x*) Clinton *v.* Hooper, 1 Ves. jun. 173; Kinnoul *v.* Money, cited 1 Ves. jun. 186; 3 B. C. C. 212, 213.

(*y*) Lewis *v.* Nangle, Amb. 150; 1 Cox. 240; Bagot *v.* Oughton, 1 P. Wms. 347; Earl of Kinnoul *v.* Money, 3 Swanst. 201, note.

raised is applied for such purpose, and the residue retained by the husband for his own benefit (*z*), because the mortgage being a single transaction, the Court will suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt.

If the wife or her heir after the husband's death promise to relinquish their claim, parol evidence is admissible of such agreement. But, it seems, that evidence will not be received of a declaration on the part of the wife that the money was intended by her as a *gift* to her husband, contrary to the express language of the deed (*a*).

The claim of the wife will not be waived by her covenant after her husband's death, that the estate shall stand charged with the original debt, and also with a further sum advanced to her (*b*).

The husband will have a right to be indemnified out of the estate of the wife, if on a transfer of a mortgage charged on the wife's estate, he enter into a covenant, or give bond for its payment (*c*); and if the husband reduces the amount and dies, his estate will be entitled to stand in the place of the mortgagee to the amount of principal paid by him (*d*), but not of interest (*e*); and if, at the time of mortgaging

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(*z*) Lewis *v.* Nangle, *supra.*

(*a*) Clinton *v.* Hooper, 1 Ves. jun. 188; 3 B. C. C. 201.

(*b*) Lacam *v.* Mertins, 1 Ves. 312.

(*c*) Bagot *v.* Oughton, 1 P. Williams, 347.

(*d*) Pitt *v.* Pitt, 2 Turner & Russ. 180, entered in Register Book as Pitt *v.* Reid.

(*e*) Ruscomb *v.* Ha[illegible], *supra*, p. 531.

the wife's estate, the husband make a provision out of his own estate for his wife's benefit, he may, under the circumstances, be considered as a purchaser of the money raised by the mortgage (*e*).

It was recommended by the Court in a case before referred to (*f*), that in instances in which it is the wife's intention that the money raised shall be a gift to her husband, the estate should be vested in trustees, upon trust by sale or mortgage to raise the sum proposed: and it is there said that supposing a conveyance to be so made, it is manifest the debt could never be the debt of the husband, but a sum of money to which he would have an original right without any obligation ever to repay.

If a mortgagor become bankrupt before payment of the mortgage debt, the mortgagee may pray a sale under the general order of the 8th March 1794 (*g*), and prove for the deficiency (*h*); or he may throw up his securities on the bankrupt's estate, and prove his debt generally (*i*), without prejudice to his claim on any surety for the debt (*k*); but having made his election to give up his securities, he cannot

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(*e*) Lewis *v.* Nangle, Amb. 150; 1 Cox, 240.

(*f*) Clinton *v.* Hooper, *supra.*

(*g*) *Vide* Appendix, No. 6.

(*h*) *Ex parte* Bennett, 2 Atk. 528; *Ex parte* Fisher, 3 Madd.; *Ex parte* Smith, 2 Rosc. 63; and see General Order, *supra.*

(*i*) *Ex parte* Grove, 1 Atk. 105.

(*k*) *Ex parte* Bennet, *supra*; *Ex parte* Wildman, 1 Atk. 109.

afterwards retract (*l*); and if he prove for the residue, he cannot charge interest beyond the date of the fiat (*m*). He may also (if he have a mortgage for the retransfer of stock) prove under the fiat the value of the stock at the date of the fiat, and the amount of dividends due prior to the fiat (*n*); and if a fiat issue prior to the time for repayment of the money secured by mortgage, and the mortgagee have also a bond for the debt, of which any breach has been committed in the payment of interest, he may prove for the whole debt (*o*), or if such breach has not been then committed, he may prove for the full amount, allowing out of the dividend a rebate of interest at 5*l.* per cent. as provided by the 6 Geo. IV. c. 16 (*p*).

In the case of Carter *v.* Barnardiston (*q*), it was held that if one seised of Whiteacre and Blackacre mortgage the former, and then by his will charge all his real estates with the payment of his debts, and devise Whiteacre to *A.*, and Blackacre to *B.*, the devisee of the former shall compel the devisee of the latter to contribute. On the like principle, if both estates had been comprized in the mortgage, and had been devised to different persons, they should have contributed (*r*): the same would be the case if the estates in mortgage were freehold and copyhold, and descended to different heirs (*s*); and

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(*l*) *Ex parte* Downes, 18 Ves. 290.
(*m*) *Ex parte* Badger, 14 Ves. 165.
(*n*) *Ex parte* Day, 7 Ves. 301.
(*o*) *Ex parte* Fisher, *supra.*
(*p*) 1 P. Wms. 506.
(*q*) 6 Geo. IV. c. 16. s. 51.
(*r*) Aldrich *v.* Cooper, 8 Ves. 390, 391.
(*s*) *Ibid.*

if the estates be of equal value, they will contribute equally (*s*).

But if a person possessed of several leasehold estates mortgage one of them, and then, by his will, bequeath them separately to different parties, and direct his debts to be paid out of his residuary personal estate, and such residuary estate prove insufficient for the purpose, the legatee of the mortgaged estate must take it *cum onere*, and cannot call on the other legatees to contribute (*t*).

The general rule of equity is, that a person having two funds to which he may resort, shall not disappoint another person who can resort to one only of the funds (*u*). This rule is frequently applicable in cases of mortgage, of which several instances are put by Lord Eldon in Aldrich *v.* Cooper. Thus in the case of two distinct estates being mortgaged to one person, and one only of the estates to another person, in order that the latter may not be disappointed, equity will compel the former to have recourse to the fund which can be affected by him only, although the estates descend to different heirs (*x*): and this equity has been applied in favour of a mortgagee whose interest in an estate was affected by an

(*s*) 8 Ves. 391; *et vide* Henningham *v.* Henningham, 2 Vern. 355; 1 Eq. Ca. Ab. 117.

(*t*) Halliwell *v.* Tanner, 1 Russell & Mylne, 633.

(*u*) *Et vide* Aldrich *v.* Cooper, 8 Ves. 391; Trimmer *v.* Bayne, 9 Ves. 209; Attorney-General *v.* Tyndall, Amb. 614; Lanoy *v.* Duke of Athol, 2 Atk. 444.

(*x*) 2 Atk. 444.

extent of the crown, even in a question with general creditors; and he was held entitled to stand in the place of the crown as to those securities which he could not affect *per directum*, because the crown had affected those in pledge to him (*y*).

By the 3 & 4 Will. IV. cap. 104, both freehold and copyhold estates, not charged by will with the payment of debts, have, subsequently to the 20th of August, 1833, become assets for the payment of specialty and simple contract debts, but with preference to creditors by specialty in which heirs are bound. Prior to this statute, copyholds were not assets for specialty debts, and therefore, on the principle before stated, if a man died, having no fund except a freehold and a copyhold estate, both comprehended in a mortgage to *A.*, but the freehold estate only being mortgaged to *B.*, *with covenant or bond* (*z*); in that case the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it; the other would then stand as a naked specialty creditor. There was, however, no doubt, that the latter being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as a mortgagee upon the copyhold estate, the same arrangements would take place; and that in equity, the second mortgagee would throw the prior incumbrancer upon the estate, to which the second had no resort.

In the preceding case of Aldrich *v.* Cooper, it was

(*y*) *Et vide* Sagitary v. Hyde, 1 Vern. 455.

(*z*) *Vide infra*, page 596.

debated whether the case of Robinson *v.* Tong (*a*) could be maintained, viz. that specialty creditors had no right to insist that a mortgage debt, secured both on freeholds and copyholds, should be thrown on the copyholds, so as to leave the specialty creditors the freehold fund; on the ground that copyholds (the case being prior to the 3 & 4 Will. IV. cap. 104,) were not assets for specialty debts, and that none of the rules of equity subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of others. Lord Eldon justly observed that it was clear the case was by no means a due application of the principle, for the copyholds, as well as the freeholds, were both subject to the mortgage debt; and as to copyholds not being assets for specialty debts, was freehold estate, he asked, assets for simple contract debts? which, at that time, it was not, either in law or equity. Upon what principle then did the Court say that in given cases, simple contract debts should be paid out of the real estate? Not upon the ground of assets, but that a specialty creditor had a double fund to resort to. Upon the like principle, the Court, in that case, directed (if it were necessary for the payment of the creditors) that the mortgagee should take his satisfaction out of the copyhold estate, and that if he took it out of the freehold, those who were thereby disappointed, should stand in his place as to the copyhold estate; thereby overruling the case of Robinson *v.* Tong (*b*). The reader

(*a*) Stated in Mr. Cox's note to P. Wms. vol. i. 680, 5th edit.

(*b*) *Et vide* Gwynne *v.* Edwards, 2 Russell, 289 (note); Greenwood *v.* Taylor, 1 Russell & Mylne, 187.

will of course bear in mind, that this reasoning has in a great measure become inapplicable since the passing of the statute above referred to.

The case of Aldrich *v.* Cooper also decided, that if freeholds are conveyed in mortgage, with a covenant "for better securing the payment of the debt," to procure admission to certain copyholds, and surrender them to the mortgagee, and in the mean time to stand seised of the copyhold estate in trust for him, both freeholds and copyholds are *primarily* mortgaged, and both equally liable to the mortgage debt.

In a modern case (*c*), in a suit instituted for the administration of assets, a mortgagee prayed that he might be allowed to prove his debt to its full amount, and that the mortgaged estate might be sold, and that to the extent of the deficiency, he might be allowed to receive payment from the proof in the cause *pari passu* with the other creditors. It was decided that, as in bankruptcy, he could only prove for the deficiency, and the Court applied to the case the general principle of the two funds which we have been considering.

As between mere volunteers, the principle does not apply, as where a man and wife, being lessees of a rectory, assigned it to trustees, upon trust to sell, and out of the produce to pay bond debts of the husband, and certain mortgages secured on his freeholds *pro ratâ;* and in consideration of the wife joining in such assignment, the husband conveyed the freeholds to uses for the benefit of himself, and wife

(*c*) Greenwood *v.* Taylor, *supra.*

and children. The rectory not being sufficient to pay both the bond debts and mortgages, the bond creditors filed their bill, praying, that instead of a *pro ratâ* payment between the two sets of creditors, the mortgages might be wholly paid out of the freeholds, but the bill was dismissed (*d*).

Although in the commencement of this work (*e*), a mortgage has been defined to be a *debt by specialty*, yet if the deed contain no covenant for payment of the debt, and the mortgagee have not a bond in which the heir is named, the mortgagee, prior to the 3 & 4 Will. IV. cap. 104, would have no claim on the heir beyond his security on the land in mortgage (*f*); and, consequently, if a preceding mortgagee had exhausted the land, he would, in such case, have been reduced to the state of a simple contract creditor, unless the proviso for redemption (if such were contained in the deed) could, in his favour, have been considered as amounting to an agreement under seal, on the part of the mortgagor and his heirs, to pay the mortgage debt. How far such a construction might be put on the proviso, does not appear to have been argued. From the principle of marshalling before stated, it follows that if, prior to the statute, a mortgagee with bond or covenant resorted to the personal estate, the simple contract creditors would have a right to stand in his place (*g*), to the amount of the sum taken by the mortgagee out of the personal estate (*h*).

(*d*) Boazman *v.* Johnson, 3 Sim. 377.

(*e*) Page 1. (*f*) *Vide* 8 Ves. jun. 394.

(*g*) 8 Ves. 394; Galton *v.* Hancock, 2 Atk. 436.

(*h*) *Vide* note Wilson *v.* Fielding, 2 Vern. 763.

CHAPTER IV.

OF FORECLOSURE.

EQUITY having determined that the mortgaged debt shall be considered the principal, and the land a pledge, and, as a consequence, that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity, on payment of principal, interest, and costs, and the mortgagee in possession accountable for the rents and profits, it became on the other hand just that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed his right of redemption. On this principle rests the doctrine of foreclosure, which we are about to consider, and in the application of which the forbearance of equity, on behalf of the mortgagor, seems to be carried to its utmost limits, even so far as, in some instances, to work a serious detriment to the mortgagee; for equity is ready to receive the excuses of the mortgagor, not only for the purpose of giving him time to procure the money previously to the foreclosure (*a*), but also for the purpose of opening the foreclosure, even after many years'

(*a*) See the case of Edwards *v.* Cunliffe, 1 Madd. 287, in which the period for payment was enlarged the fourth time.

quiet possession by the mortgagee, under an absolute decree of foreclosure confirmed, signed, and enrolled.

A mortgagee may by agreement debar himself of the right to foreclose for a given period, and during that time he is precluded from filing his bill to redeem a prior mortgagee, because he has no right to redeem a prior mortgagee without praying a foreclosure against the mortgagor (*b*).

The usual course pursued on foreclosure is, for the mortgagee to file his bill, praying that an account may be taken of principal and interest, and that the defendant may be decreed to pay the same with costs by a short day, to be appointed by the Court, and in default thereof, he may be foreclosed his equity of redemption. On the answer coming in, the matter is referred to one of the Masters to take the account, and a decree is made for payment of principal, interest, and costs, within six calendar months (*b*) after the Master's report of what is due on that account, or in default, the mortgagor shall stand foreclosed. After the account has been taken, the Master makes his report, and appoints a day for payment; the report is confirmed, and, on default made, the mortgagee may obtain an absolute order for foreclosing(*c*): the order is afterwards signed and enrolled, and the foreclosure is complete.

In Ireland it is the practice, instead of a fore-

(*b*) Ramsbottom *v.* Wallis, Appendix.
(*c*) *Vide* 2 Eq. Ca. Ab. 605.
(*d*) Senhouse *v.* Earl, 2 Ves. 450.

closure, to pray that the estate may be sold, and the monies applied in satisfaction of the incumbrances, and the surplus paid to the mortgagor (*d*). If there is a deficiency, the mortgagee has his remedy for the difference.

In certain instances also in England a decree for a sale instead of foreclosure may be obtained (*e*), as, if the mortgage be of a dry reversion (*f*), or if the heir of the mortgagor be an infant (*g*); in which latter case, a foreclosure or sale in the alternative should be prayed, and if a foreclosure alone is prayed, the Court will, with the mortgagee's consent, refer it to the Master, to inquire whether it will not be for the infant's benefit that a sale should be made (*h*). It also seems, that if the bill for foreclosure be taken *pro confesso*, the Court will order a sale (*i*); and if one of the executors of the mortgagee be himself the mortgagor, the bill by the co-executors should be for a sale (*k*). If the mortgagor die, and the heir and executor be the same person who, by his answer, admits the personal estate deficient for payment of debts, a sale may be obtained in the first instance, without a reference for an account of the personal

(*d*) 13 Ves. jun. 205.

(*e*) *Quære* whether a mortgagee of a Jamaica estate is entitled on a bill of foreclosure in England to a sale, according to the laws of the colony, Beckford *v.* Kemble, 1 Sim. & Stu. 15.

(*f*) How *v.* Vigures, 1 Ch. Rep. 33; 15 Vin. 475.

(*g*) Booth *v.* Rich, 1 Vern. 295; 15 Vin. 475.

(*h*) Mondey *v.* Mondey, 1 V. & B. 223; *vide contra* Goodier *v.* Ashton, 18 Ves. 83, overruled by Mondey *v.* Mondey; and see 1 Will. IV. c. 47, s. 10, as to the parol not demurring.

(*i*) Dashwood *v.* Bithazey, Moseley, 196.

(*k*) Lucas *v.* Seale, 2 Atk. 56.

estate (*l*). Lord Hardwicke seems to have thought if the security was scanty a sale might be decreed (*m*). If the security is by equitable deposit of title deeds, the creditor is entitled to pray a sale (*n*).

In the above case of Daniel *v.* Skipworth, Lord Thurlow is reported to have said, that if the heir and executor had been different persons, an account of the personal estate must have been first taken; from which Mr. Powell inferred, generally (*o*), that if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale of the mortgaged estate in the first instance. The case certainly appears to warrant this conclusion. A modern writer (*p*) seems to have thought that in any case in which a mortgage security is *deficient*, a sale might be prayed; and gives as a reason, that to pray a foreclosure, which the next day is liable to be opened, (that is, by the mortgagee proceeding at law on his other securities, as will be hereafter noticed,) is a mode of relief to which equity would not confine a *bonâ fide* mortgagee. This however, it is submitted, is very different from the case put by Lord Thurlow, where you have both the heir and executor before the Court, and the personal estate is become the primary fund for payment of the debt, which, on an account, proves to be deficient. The order for sale in such case may be very properly

(*l*) Daniel *v.* Skipworth, 2 B. C. C. 155.

(*m*) Earl of Kinnoul *v.* Money, 3 Swanst. 208, note.

(*n*) Pain *v.* Smith, 2 Mylne & Keen, 417.

(*o*) Powell on Mortgage, 1094, 4th edit.

(*p*) Patch on Mortgage, 426.

made. But it is submitted, there is no authority for the general doctrine, that on an alleged deficiency of the mortgage security, a sale may, in the first instance, be prayed. How is it to be ascertained, that the security is deficient as the foundation for the decree for sale? As to the argument, that equity will not hold a mortgagee to a mode of relief liable to be the next day defeated, it may be answered, that if the mortgagee suspect his security to be deficient, he may, in the first instance, proceed against the mortgagor on his collateral securities, and file his bill for the deficiency. It is true that in Dashwood *v.* Bithazey (*q*), the Master of the Rolls said, that where the security was *defective,* it was often referred to the Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto,* as in the case of Homden *v.* Tilby, on a bill of foreclosure of the shops in Westminster Hall. But this observation seems to apply to a *defective,* and not a deficient security. Mr. Fonblanque (*r*), referring to the doubt hereafter stated, whether equity will restrain a mortgagee from proceeding on his bond after foreclosure and sale, observes, "the safer course is for the mortgagee to pray a sale; but note, he cannot pray a sale, without previously praying a foreclosure."

Although equity, after default by the mortgagor in payment of the debt, will give the mortgagee relief by foreclosure, and in certain instances by sale, as before mentioned, yet the Court, in accordance with its principle of considering the estate a pledge, will grant the mortgagor every fair allowance of time to

(*q*) Moseley, 196. (*r*) Treat. on Equity, 278, note.

enable him to discharge the debt. The time for payment may be, therefore, renewed, on proper application to the Court, even after the decree is signed and enrolled (*s*); nor will it make a difference that the proceedings are under the 7 Geo. II. cap. 20, s. 2; the time may be enlarged in either case (*t*). But on enlargement of the time, the mortgagor will be decreed to pay the amount of interest and costs then found due by the Master's report (*u*).

If the mortgagor file his bill to redeem, and a day be appointed for payment, and he make default in consequence of which his bill is dismissed, this will be equivalent to a decree of foreclosure (*v*); and not only the mortgagor and his heirs, but a purchaser of the equity of redemption *pendente lite* will be bound by it (*x*); and equity will not, as in the case of foreclosure, enlarge the time for payment (*y*). But if the bill be dismissed for want of prosecution, and not for want of payment, the mortgagor will not be estopped from filing a second bill to redeem (*z*).

So anxious is equity to afford every reasonable relief to the mortgagor, that even after a decree of

(*s*) Anon. Barnard. 221; 2 Eq. Ca. Ab. 605; Cocker *v.* Bevis, 1 Ch. Ca. 61; 15 Vin. 475; Ismood *v.* Claypool, 1 Ch. Rep. 262; Edwards *v.* Cunliffe, *supra.*

(*t*) Wakerell *v.* Delight, 9 Ves. 36; *vide* 17 Ves. 417.

(*u*) Whatton *v.* Craddock, 1 Keen, 269, *et vide supra.*

(*v*) Cholmley *v.* Lord Oxford, 2 Atk. 267; Bishop of Winchester *v.* Payne, 11 Ves. jun. 199.

(*x*) Garth *v.* Ward, 2 Atk. 175.

(*y*) Novosielski *v.* Wakefield, 17 Ves. jun. 417.

(*z*) Hansard *v.* Hardy, 18 Ves. jun. 460.

foreclosure has been signed and enrolled, and the mortgagee has been in possession for many years, nevertheless the Court will, under special circumstances, open the decree. In one case the foreclosure was opened after sixteen years (*a*); and in other cases, the Court has granted the relief on fresh evidence adduced on the mortgagor's behalf (*b*).

There are also certain acts of the mortgagee which will of themselves open the decree, as if there has been unfair conduct or collusion on his part in obtaining the decree (*c*); or if, after foreclosure, he proceed against the mortgagor on his bond or other collateral security (*d*), which the mortgagee may lawfully do (*e*). Whether equity will grant an injunction against the proceedings at law if the mortgagee has sold the estate, and deprived himself of the means of letting the mortgagor redeem, does not seem clear (*f*).

Equity, however, will not open a decree of foreclosure by reason of the overvalue of the estate, and a parol agreement to permit a redemption (*g*); and

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(*a*) Burgh *v.* Langton, 15 Vin. 476; 2 Eq. Ca. Ab. 609; 5 B. P. C. 213.

(*b*) Cocker *v.* Bevis, *supra*; Ismood *v.* Claypool, *supra*.

(*c*) Burgh *v.* Langton, *supra*; Lloyd *v.* Mansell, 2 P. Wms. 71; Gore *v.* Stockpole, 1 Dow, 18; Harvey *v.* Tebbutt, 1 Jacob & Walker, 197.

(*d*) Dashwood *v.* Blithway, 1 Eq. Ca. Ab. 517; 15 Vin. 476.

(*e*) Tooke *v.* Hartley, 2 B. C. C. 126; 2 Dick. 785.

(*f*) *Vide* Tooke *v.* Hartley, *supra*; Perry *v.* Barker, 8 Ves. jun. 527; 13 Ves. 198; 2 Fonb. 277.

(*g*) Wishal *v.* Short, 3 B. P. C. 558; 2 Eq. Ca. Ab. 177; 7 Vin. 398.

after twenty years' possession, the Court will not set aside the foreclosure for mere form (*h*); nor will a bill of revivor and supplement be a waiver of the decree (*i*); nor will the mere fact of the mortgagee devising the estate as money (*k*), or noticing it, for a collateral purpose, as a debt, open the foreclosure (*l*); and if there have been considerable alterations made in the estate, accompanied with length of possession, the decree will not be opened (*m*). No general rule can, however, be laid down for the opening of a foreclosure; each individual case must rest on its own merits.

A decree of foreclosure cannot be obtained until the estate has become forfeited at law by breach of the condition (*n*); consequently on a Welch mortgage there can be no foreclosure (*o*); and although it is a matter of common right, yet equity will refuse it in case of fraud (*p*); nor will the Court permit the mortgagee's title to be investigated under the proceedings in foreclosure; the Court can only bar the equity of redemption; and will leave the mortgagee

(*h*) Jones *v.* Kenrick, 5 B. P. C. 244; 2 Eq. Ca. Ab. 602; 15 Vin. 470.

(*i*) Birch's case, Gilbert's Rep. in Eq. 186.

(*k*) Silberschildt *v.* Schiott, 3 Ves. & Bea. 45; Stuckville *v.* Dolben, 15 Vin. 476; Sel. Ch. Ca. 10.

(*l*) Tooke *v.* Bishop of Ely, 5 B. P. C. 181; 15 Vin. 476; 2 Eq. Ca. Ab. 252, note 2.

(*m*) Lant *v.* Crisp, 5 B. P. C. 200; 2 Eq. Ca. Ab. 599; Took *v.* Bishop of Ely, *supra*.

(*n*) Bonham *v.* Newcome, 2 Vent. 365; 1 Vern. 232.

(*o*) Howell *v.* Price, Prec. Ch. 423; 1 P. Wms. 291, *et vide* 1 Ves. 407; and *supra*, p. 232; but as to copyholds, *vide infra*, p. 607.

(*p*) Saunders *v.* Dehew, 2 Vern. 271; Bacon's Ab. vol. v. p. 101.

to pursue his legal means to establish it (*q*). A default in payment of a half-year's interest on the appointed day, will be a sufficient breach of condition to enable the mortgagee to foreclose (*r*).

It is decided, that a mortgagee may, at the same time, proceed in all his remedies at law and in equity; he may, at the same moment, bring his ejectment, file his bill of foreclosure, and proceed on his bond and other collateral securities (*s*), although the Court will, under special circumstances, grant an injunction against the proceedings at law (*t*). The best and safest course for a mortgagee to pursue, if he suspect the estate is not adequate to discharge the debt, and he cannot obtain a sale by a decree of equity (*u*), is to proceed on his legal securities first; for it has been seen that if he first obtain a decree of foreclosure, and afterwards proceed at law, he will re-open the foreclosure; and if he obtain a foreclosure and sell, and then proceed at law for the difference, it is doubtful whether equity will not grant an injunction; but if he first proceed at law, he may afterwards obtain a decree in equity for payment of the remainder; and, on default of payment,

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(*q*) Anon. 2 Ch. C. 244; 15 Vin. 475; 5 Bac. Ab. 100.

(*r*) Stanhope *v.* Manners, 2 Eden, 197; Gladwin *v.* Hitchman, 2 Vern. 135; Taylor *v.* Waters, 1 Myl. & Craig, 266.

(*s*) Burnell *v.* Martin, Dougl. 417; Schoole *v.* Sall, 1 Sch. & Lef. 176; Rees *v.* Parkinson, 2 Anst. 497; *et vide* 2 Ves. 678; 2 Atk. 343, and *supra*, page 417.

(*t*) Booth *v.* Booth, 2 Atk. 344; Schoole *v.* Sall, *supra*; *et vide supra*, 417.

(*u*) As to this, *vide supra*, page 600, *et seq.*

foreclose the estate. If the mortgagee petition for sale of his security, and to prove in a suit for the administration of assets, he can only prove for the deficiency, and will not be entitled to a dividend on his entire debt (*x*).

If a conditional surrender be made of a copyhold, a mortgagee may, before admittance and after breach of the condition, proceed to foreclose the estate (*y*); and a mortgagor of copyholds will, on foreclosure, be directed, if necessary, to surrender to the plaintiff, at the expense of the latter (*z*).

It has been already stated that on mortgages of stock, the mortgagee may forthwith proceed to sell without a decree of the Court, accounting nevertheless for the surplus (*a*).

It is requisite to consider what parties are necessary to a bill of foreclosure. The general rule of the Court is, that all persons having an interest in the equity of redemption must be made parties, and therefore the *cestuis que trust* named in a deed conveying the equity of redemption to trustees upon trust to sell, are necessary parties to a bill of foreclosure, although by the deed the trustees have authority to give valid discharges to purchasers (*b*). A

(*x*) Greenwood *v.* Taylor, 1 Russell & Mylne, 185.
(*y*) Sutton *v.* Stone, 2 Atk. 101, *et vide supra*, 113.
(*z*) Hill *v.* Price, 1 Dick. 344.
(*a*) *Vide supra*, page 362.
(*b*) Calverley *v.* Phelp, 6 Madd. 229.

person entitled to part of the mortgage money cannot file his bill of foreclosure for an aliquot part of the estate (*c*). In a subsequent chapter, it will be explained that in whatever form the money is made payable, it will belong to the executor, and that the heir at law of a mortgagee in fee, is a trustee of the estate for the personal representative. It is, therefore, good cause of demurrer to a bill of foreclosure filed by the heir of the mortgagee, that the executor of the mortgagee is not a party (*d*), and even if the bill be not demurred to, but it comes out in the course of the hearing that the executor is not a party, the plaintiff cannot, it seems, be permitted to proceed (*e*). But, nevertheless, if the cause proceed, and a decree is obtained by the heir of the mortgagee, without the executor, it will be binding on the mortgagor; and, it seems, the heir of the mortgagee may either pay the mortgage-debt to the personal representative or give up the estate (*f*).

If *A.* mortgage to *B.*, and *B.* make a derivative mortgage to *C.*, *B.* will be a necessary party to a bill of foreclosure by *C.*, to prevent a double account (*g*). But a second mortgagee may file a

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(*c*) Palmer *v.* Carlisle, 1 Sim. & Stu. 433.

(*d*) Freak *v.* Hearsay, 1 Ch. Ca. 51; 2 Freem. 160; 5 Bac. Ab. 101.

(*e*) Meeker *v.* Tanton, 2 Ch. Ca. 29; 5 Bac. Ab. 101.

(*f*) Clerkson *v.* Bowyer and another, 2 Vern. 66; Globe and Wife *v.* Earl of Carlisle, cited in Clerkson *v.* Bowyer, *supra; et vide* 5 Bac. Ab. 102.

(*g*) Hobart *v.* Abbott, 2 P. Wms. 643; 5 Bac. Ab. 100.

bill of foreclosure against the mortgagor, and a third mortgagee, without making the first mortgagee a party (*h*). But a second mortgagee cannot file a bill to redeem the first mortgagee, without making the mortgagor a party to the bill (*i*).

If there are several mortgagees who are joint tenants of an entire thing, all must be parties to the foreclosure (*k*). But if trustees lend on mortgage the monies of several *cestuis que trust*, one of the *cestuis que trust* alone may file his bill of foreclosure, the trustees having refused to assist him, and being made defendants in the cause (*l*).

In all cases, however, the trustee himself *must* be made a party to a bill of foreclosure by the *cestui que trust*, as having the legal estate (*m*), and for the like reason the heir of the mortgagee must be made a party in a bill filed by the executors of the mortgagee (*n*). But if the mortgagee devise the lands in mortgage, and the money due thereon to another, the heir of the mortgagee is not a necessary party (*o*); and if the devisee make the heir a party, he will not be allowed the costs out of the estate (*p*).

(*h*) Rose *v.* Page, 2 Sim. 471.
(*i*) Ramsbottom *v.* Wallis, Appendix.
(*k*) Lowe *v.* Morgan, 1 B. C. C. 368.
(*l*) Montgomerie *v.* Marquis of Bath, 3 Ves. jun. 560.
(*m*) Wood *v.* Williams, 4 Madd. 186.
(*n*) Scott *v.* Nicoll, 3 Russell, 477.
(*o*) Howe *v.* Vigures, 1 Rep. in Ch. 32; 1 Eq. Ca. Ab. 318.
(*p*) Skipp *v.* Wyatt, 1 Cox, 353.

In case of mortgage of real estate, whether in fee or for a term of years, the mortgagor, not being bankrupt (*q*), or his heir (*r*), is an absolutely necessary party in a bill of foreclosure (*s*); but the executor of the mortgagor need not be made a party (*t*). In a modern case (*u*), the mortgage was for a long term of years created by tenant in fee; the executrix was made a party to the bill, which was dismissed as against her, and, *by consent*, without costs. In a bill for sale, however, after the death of the mortgagor, the personal representative should be a party (*x*), because the personal estate must be first applied.

If the estates of two different persons be in one mortgage, both the mortgagors must be made parties to a bill of foreclosure (*y*).

An insolvent mortgagor is not a necessary party, although his assignees disclaim all interest in the equity of redemption (*z*).

If the first tenant in tail of the equity of redemption be a party to the bill, the decree will bind all the remainder men and the reversioner (*a*). And if

(*q*) Lloyd *v.* Lander, 5 Madd. 282.

(*r*) Farmer *v.* Curtis, 2 Sim. 466.

(*s*) Howes *v.* Wodhave, Ridgway's Rep. 199.

(*t*) Duncombe *v.* Hansley, 3 P.Wms, 333, note; 5 Bac. Ab. 101; Fell *v.* Brown, 2 B. C. C. 276.

(*u*) Bradshaw *v.* Outram, 13 Ves. 234.

(*x*) Daniel *v.* Skipwith, 2 B. C. C. 155.

(*y*) Stokes *v.* Clindon, 3 Swanst. 150, note.

(*z*) Collins *v.* Shirley, 1 Russ. & Myl. 638.

(*a*) 2 Atk. 191; Yates *v.* Hambly, 2 Atk. 237; 5 Bac. 102; *et vide* 1 Dow, 31; Roscarrick *v.* Barton, 1 Ch. Ca. 220.

a decree for account and foreclosure be obtained, and the first tenant in tail release to the mortgagee, the remainder men and reversioner will be also bound (*b*).

If there be an express estate for life, the first tenant in tail or the reversioner must, generally speaking, be also a party (*c*). But in one instance in which the tenant in tail was abroad (*d*), and out of the jurisdiction of the Court, a degree of foreclosure was obtained against the parties before the Court.

If the equity of redemption is conveyed to trustees upon trust to sell and pay off incumbrances and divide the surplus among certain persons specified in the deed, with a proviso authorizing the trustees to give discharges, all the *cestuis que trust* are necessary parties to the bill (*e*).

With respect to incumbrances subsequent to the mortgage, but prior to the filing of the bill, the rule appears to be, that the decree of foreclosure will bind all those who are parties to the bill, but not the rest (*f*); and, consequently, a second mortgagee, or other subsequent incumbrancers who are not parties to the bill, may, on payment of the first mortgage-debt and costs (*g*), redeem the first mortgagee after the decree obtained, although the first

(*b*) Reynoldson *v.* Perkins, Amb. 564.

(*c*) 2 Atk. 101; 1 Dow, 31.

(*d*) Fishwick *v.* Lowe, 1 Cox, 411.

(*e*) Calverley *v.* Phelp, 6 Madd. 229.

(*f*) Draper *v.* Jenning, 2 Vern. 518; Sherman *v.* Cox, 3 Ch. Rep. 84; Nelson's Rep. 71; 5 Bac. Ab. 102.

(*g*) Lomax *v.* Hide, 2 Vern. 185.

had no notice of the other incumbrances at the time of the decree (*h*). But the decree will be binding on all creditors, by mortgage or judgment (*i*), and assignees of the equity of redemption (*k*), subsequent to filing the bill (*l*).

This distinction is grounded on the principle that the incumbrancers and assignees of the equity of redemption, subsequent to the filing of the bill, are affected by notice, having taken their securities and assignments *pendente lite*. And the like will be the case, although the suit afterwards abate, and a bill of revivor be filed to which these incumbrancers, &c. are not made parties (*m*). The same would probably be the consequence if the mortgage or purchase of the equity of redemption were made *during an actual abatement* of the suit. (*n*).

We have already seen (*o*) that on a bill of foreclosure against an infant, a reference to the Master may, with the mortgagee's consent, be obtained, to inquire whether it will be for the infant's advantage, that a sale should be made. The mortgagee may, however, object to such a reference, and insist on a

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(*h*) Godfrey *v.* Chadwell, 2 Vern. 601; Morret *v.* Westerne, 2 Vern. 663; Sherman *v.* Cox, *supra*.

(*i*) Bishop of Winchester *v.* Beavor, 3 Ves. 315; Bishop of Winchester *v.* Paine, 11 Ves. 198.

(*k*) Garth *v.* Ward, 2 Atk. 175; *et vide* 11 Ves. 199.

(*l*) Bishop of Winchester *v.* Paine, *supra;* which case overrules Crisp *v.* Heath, 7 Vin. Ab. 52.

(*m*) Bishop of Winchester *v.* Paine, *supra*.

(*n*) Style *v.* Martin, 1 Ch. Ca. 150; *sed vide* 11 Ves. 200, 201.

(*o*) *Supra*, p. 600.

foreclosure; and, it is clear, that a decree of foreclosure against an infant may be obtained (*p*). The usual order on a bill of foreclosure against an infant is for a reference to the Master, to take the account in the usual way, and appoint a day for payment, and in default of payment, the defendant is to be foreclosed; and the decree is to be binding on the infant, unless, on being served with a subpœna to shew cause against the same, he shall, within six months after he shall have attained the age of twenty-one years, shew to the Court good cause to the contrary (*q*). If there are several defendants, and default is made in payment, the foreclosure will be made absolute on such of the defendants as are adult, but as to the infants, the clause nisi may be repeated (*r*). The infant, however, need not wait until twenty-one to shew cause against the decree. He may, by his *prochein ami*, shew cause at any time (*s*). If he shews cause, he may put in a new answer (*t*). He cannot, however, go into the account or redeem, but must shew error in the decree (*u*);

(*p*) Williamson *v.* Gordon, 19 Ves. 114; Mallack *v.* Galton, 3 P. Wms. 352; Lyne *v.* Willis, *ibid.* note; Bishop of Winchester *v.* Beavor, 3 Ves. jun. 317; Booth *v.* Rich, 1 Vern. 295; Gundry *v.* Baynard, 2 Vern. 479; Taylor *v.* Phillips, 2 Vez. 23; *et vide* 1 Will. IV. c. 47, s. 10.

(*q*) 3 Bac. Ab. 615; Bennett *v.* Edwards, 2 Vern. 392; Leving *v.* Lady Caverley, Pre. Ch. 229.

(*r*) Williamson *v.* Gordon, *supra.*

(*s*) Richmond *v.* Tayleur, 1 P. Wms. 736; Bennett *v.* Lee, 2 Atk. 531.

(*t*) Bennett *v.* Lee, 2 Atk. 532; Fountaine *v.* Caine, 1 P. Wms. 504; Napier *v.* Effingham, 2 P. Wms. 401.

(*u*) Mallack *v.* Galton; Lyne *v.* Willis; Bishop of Winchester *v.* Beavor; Williamson *v.* Gordon, *supra.*

and if he does not shew cause within the limited time he will be bound (*x*). The process by subpœna is to be served on the defendant on his coming of age, and is a judicial writ, and must be returned in term time (*y*). The author is not aware that any alteration has been made in this practice since the passing of the 1 Will. IV. cap. 47, which has provided that the parol shall not demur by reason of infancy (*z*).

Under special circumstances, the Court will refuse a decree of foreclosure against an infant, as in a case in which a mortgage was assumed to be made under a power, and it was a question whether the power was well exercised (*a*); and in another case (*b*), in which the security was defective, but the heir was bound to make further assurance by his ancestor's covenant. In the latter case, the Court ordered the account to be taken, and a day appointed for payment, and in case of default the mortgagee was to be let into possession, and the infant, on attaining twenty-one, was to convey, unless, within six months. he shewed good cause to the contrary.

If the infant be the plaintiff, and bring his bill by his guardian to redeem, and a day is given for that purpose, and default made in payment, and the bill consequently dismissed, which, as before stated, is tantamount to a foreclosure, it does not seem clear

(*x*) 3 Bac. Ab. 615. (*y*) *Ubi supra.*

(*z*) 1 Will. IV. c. 4, s. 10. *Et vide* Powys v. Mansfield, 6 Sim. 637.

(*a*) Sayle v. Freeland, 2 Vent. 350.

(*b*) Spencer v. Boyes, 4 Ves. jun. 370.

whether the infant will be bound, or will have six months after he comes of age to shew cause (*c*).

It has been already stated, that in case of infancy, a sale should be prayed by the mortgagee (*d*), by which the infant will be bound (*e*); the practice however has been, that if the infant is decreed to join in the conveyance, a day must be given him after he comes of age, within which he may shew cause to the contrary (*f*). But to this the provision in the 1 Will. IV. cap. 47, against the parol demurring, may be held to apply. And if the mortgagee is willing to dispense with the infant's concurrence, a sale may be made without him, and consequently a day need not be given him (*g*).

The same reasoning does not hold in the case of coverture as of infancy, for the law considers that a woman, on her marriage, has reposed in her husband sufficient authority to protect her interests, and therefore a decree of foreclosure against a married woman and her husband, of the right of redemption in the wife, will be binding, and she will not be allowed a day after discoverture (*h*).

Chambers in the inns of court appear to be sub-

(*c*) *Vide* Gregory *v.* Molesworth, 3 Atk. 625; Napier *v.* Effingham, *supra.* (*d*) *Supra.*

(*e*) Booth *v.* Rich, 1 Vern. 295.

(*f*) Cooke *v.* Parsons, 2 Vern. 429; Pre. in Ch. 184; Fountain *v.* Caine, *supra;* Adams *v.* Gould, 2 Dick. 443. *Sed nunc vide* 1 Will. IV. c. 47, s. 10; and Powys *v.* Mansfield, 6 Sim. 638.

(*g*) Cooke *v.* Parsons, *supra.*

(*h*) Mallack *v.* Galton, 3 P. Wms. 352.

ject to the local jurisdiction and authority of the benchers, and the courts of law will not interfere in respect of them; but if the benchers decline to exercise their authority, the ordinary courts will take cognizance of the question; and, therefore, if the benchers refuse to make an order for the foreclosure, or sale of chambers in mortgage, a decree may be obtained in a court of equity (*i*).

In another part of this Treatise (*k*), when speaking of mortgages of the equity of redemption, it has been stated that, by legislative enactment (*l*), a fraud by the mortgagor in executing a second mortgage without giving previous notice of the existing mortgage, is punishable by the loss of his right of redemption, provided other lands are not added in the second mortgage to those in the first mortgage; it is not, therefore, in this place requisite to explain the law on this point.

The final order to a decree of foreclosure is absolutely necessary to its perfection, so much so that without its being obtained, a decree of foreclosure is not a good plea to a bill to redeem (*m*); but a release by the mortgagor, after the first decree, would be tantamount to a final order (*n*).

In matters of foreclosure, computation of time must be by calendar, and not lunar months (*o*).

(*i*) Rakestraw v. Brewer, Select Ca. in Ch. 55; 2 P. Wms. 511.
(*k*) Page 228 *et seq.* (*l*) 4 & 5 Will. III. c. 16.
(*m*) Senhouse v. Earl, 2 Ves. 450; 5 Bac. 102.
(*n*) Reynoldson v. Perkins, Amb. 564.
(*o*) Anon. Barnard. 324; 2 Eq. Ca. Ab. 605.

CHAPTER V.

TO WHOM THE MONEY AND LANDS IN MORTGAGE WILL BELONG.

So long as the money and lands in mortgage retain their respective characters impressed upon them in equity, that is, so long as the debt remains the principal, and the land the pledge, so long the mortgage will be personal assets; and accordingly, if the mortgage be in fee, and the mortgagee die, his heir or devisee will be a trustee for the executor (*a*), and if the heir receive the money, it may be recovered from him by the executor (*b*). Doubts were formerly entertained in this respect in cases in which the mortgage was in fee, and there was neither bond nor covenant for payment of the money (*c*), or where the condition for redemption was upon payment to the mortgagee, his heirs or executors. But these are so completely removed, as to render it a mere waste of time to enter into a consideration of the cases upon the subject; the law being now clear, that whatever may be the form of the mortgage, it will be part of the personal assets of the mortgagee, and, conse-

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(*a*) Barnard. 50. (*b*) Tabor *v.* Tabor, 3 Swanst. 636.

(*c*) Tilley *v.* Egerton, 1 Rep. in Ch. 181. See also the several cases noticed in 3 Swanst. 631.

characters, for the land has ceased to be a pledge, and the debt has become merged in the land, and, consequently, if from any circumstances after the death of the mortgagee, the foreclosure shall be opened, or the release set aside, it is submitted that the heir, and not the executor, will be entitled to the money: inasmuch as the mortgagee has done all in his power to make it real estate. This doctrine was applied in favour of a devisee, in a case in which a decree nisi only had been obtained on a bill for foreclosure; the mortgagee dying before a final decree (*h*); although, with regard to creditors, the mortgage was still held to be personal assets for the payment of debts.

As the personal representatives are entitled to the money, and, as the land is, in equity, a pledge for the payment of it, it follows, that if the pledge is forfeited, the personal representative must be also entitled to the land composing the pledge; and therefore, if the mortgagee die, and his heir obtain a release of the equity from the mortgagor, or the land becomes irredeemable from length of time, it will nevertheless belong to the personal representative (*i*), and the heir will be a trustee for him; although if the heir foreclose, it seems questionable whether he

(*h*) Garrett v. Evers, Moseley, 364; *sed vide* Thompson v. Grant, 4 Madd. 438.

(*i*) Ellis v. Gnavas, 2 Ch. Ca. 50; Canning v. Hicks, *ibid.* 187; 1 Vern. 412; Tabor v. Grover, 2 Vern. 367; 1 Eq. Ca. Ab. 328; Wood v. Nosworthy, cited 2 Vern. 193; Clerkson v. Bowyer, *ibid.* 66.

may not pay off the mortgage, and retain the estate (*k*). On the same principle, if a feme covert be possessed of a mortgage in fee, and die, and the lands descend on her heir, her husband will be entitled as her administrator (*l*); and, in like manner, a mortgage in fee made to a citizen of London, was held to be part of his personal estate, and divisible according to the custom (*m*); and in all these cases, the heir at law will be a trustee for the persons beneficially entitled, and be decreed to convey.

If two persons advance money jointly on mortgage, and one of them die, the debt will at law belong to the survivor, but in equity there will be a tenancy in common (*n*); and, therefore, on paying off the mortgage, the concurrence of the personal representatives of the deceased mortgagee is necessary, to give a valid discharge to the mortgagor. The consequence is, that when money is lent by trustees, and it is not desirable to put notice of the trust on the mortgage deed, it has become a practice to insert a declaration, that if one of the mortgagees shall die before the money is paid off, the receipt of the survivor shall be a sufficient discharge; and that the concurrence of the personal representative of the deceased mortgagee, shall not be requisite. If lands in mortgage are foreclosed by two or more persons, or the equity of redemption is released to them, the

(*k*) *Vide supra*, page 608. (*l*) Turner v. Crane, 1 Vern. 170.

(*m*) 1 Ch. Ca. 285; 2 Freem. 144.

(*n*) Petty v. Styward, 1 Ch. Rep. 31; 1 Eq. Ca. 290; *et vide* 2 Ves. 258; 3 Ves. 631.

parties will in equity hold the lands as tenants in common (*o*).

The rule appears formerly to have been, that if the mortgagee devised the lands to one for life, with remainder to another in fee, and the money was afterwards paid in, the tenant for life was entitled to one-third part of the principal, and the remainderman to the residue (*p*). But at the present day it is conceived, the whole money must be invested on trusts corresponding with the limitations of the estate.

The receipt of one of several executors is a sufficient discharge of a debt due to the testator, for each executor represents the deceased (*q*); and therefore if the mortgage is paid to one only of several executors, whether before or after probate, he may give a valid release (*r*).

If a mortgage, whether for a term of years or in fee, belong to a married woman, the husband may reduce it into possession during their joint lives; and if it be for a term of years, he may alone surrender the term; but if it be in fee, a conveyance from him and his wife may be necessary. If the mortgage be for a term of years, he may alone assign the term and debt (*s*), either for or without a valuable consideration; and it will be binding on the wife sur-

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(*o*) 2 Ves. 258; 3 Ves. 631.

(*p*) *Vide* Brent v. Best, 1 Vern. 70. (*q*) 2 Ves. 267.

(*r*) Austen v. Executors of Dodwell, 1 Eq. Ca. Ab. 319.

(*s*) Packer v. Wyndham, Ch. Pre. 412; Bates v. Dandy, 2 Atk. 207, more fully reported 3 Russell, 72.

viving (*t*). If the mortgage be in fee, and he assign it without his wife's concurrence, or if he become bankrupt, then, it is conceived, equity will not compel her to join in a conveyance without a settlement of part being made upon her, supposing her husband had not become a purchaser of her personal estate by marriage settlement (*u*); and if her husband should die before the legal fee be divested out of her, it may be questionable whether she might not be enabled to recover the whole debt against either the particular or general assignee (*x*). If the husband survive, he will become absolutely entitled to the money, and the heir at law of the wife (if the mortgage be in fee) will be a trustee for him; but if the wife survive, and it be not reduced into possession or legally assigned away, it will survive to her.

(*t*) Mitford *v.* Mitford, 9 Ves. 98.

(*u*) *Vide* Wright *v.* Morley, 11 Ves. 17; Beresford *v.* Hobson, 1 Madd. 373.

(*x*) Mitford *v.* Mitford, *supra;* Packer *v.* Wyndham, *supra*; Gilb. Lex Præt. 277; *sed vide contra* Bosvil *v.* Brander, 1 P. Wms. 459; and see Purdew *v.* Jackson, 1 Russell, 39, arguendo.

BOOK THE SIXTH.

CHAPTER I.

OF THE RIGHT OF REDEEMING.

THE right of redemption being a creature of equity must be subject to the rules of equity. The Court, therefore, will make terms with the mortgagor, if necessary, before it permits him to redeem; and the decree for redemption will be either absolute or conditional, as suits the circumstances of the case. Of this, an instance occurs (*a*) in which a mortgagee, having purchased the estate for a valuable consideration, a third party made adverse claim to the right of redemption, but was desirous of having the validity of the mortgage tried at law, before he should redeem; the Court held that he ought to declare whether he would redeem or not before he disputed the title, and that if he would redeem he ought to pay the defendant all his principal money, damages, and costs, which he refusing,

(*a*) Smith *v.* Vallance, 1 Ch. Rep. 170; *et vide* Goodtitle *v.* Bailey, Cowp. Rep. 601.

the Court dismissed the bill: and in another case (*c*), in which an infant heir of a mortgagor, by his guardian, having fruitlessly endeavoured by proceedings at law to overthrow the mortgagee's title, brought his bill to redeem, but the Court would not allow redemption, unless the mortgagor would pay a sum of money which the mortgagee, on his oath, declared he had paid above his taxed costs, in defending the title at law, and the Court also allowed him his costs of taking out administration to the mortgagor as principal creditor.

The general rule of equity however is, that the Court will render its assistance to all pernors of the profits, and all persons claiming any share or interest in the equity of redemption, unless, indeed, their title may have been obtained by fraud, as in a case (*d*) in which a man having married an infant heiress, procured her to levy a fine, and the father of the husband was one of the commissioners who took the fine, the use of which was declared, on failure of their issue, to the survivor in fee; the wife died without issue, and an infant; the husband afterwards made a mortgage in fee, and died; on which the equity of redemption descended on his uncle, and from him on the father of the husband, and from him on the wife of the plaintiff. The defendant was the heir of the wife, who had bought in the mortgage, and obtained possession of the title deeds, and got into possession, and, being in possession, had levied a

(*c*) Ramsden *v.* Langley, 2 Vern. 536.

(*d*) Packington *v.* Barrow, Pre. in Ch. 216.

fine, and five years had passed. The deed declaring the uses of the first fine was lost. The bill was filed by the plaintiff and wife for a discovery of the deed, and a redemption. The defendant pleaded the ill practices used in obtaining the first fine, and also his own fine and the non-claim, and that there was no such deed as the bill sought, or if there was, it was obtained by fraud. The plaintiff proved the execution of the deed. The Court said, that the father, in taking the fine from his daughter-in-law, could not have been aided in equity; and the plaintiffs claimed under him. The bill was dismissed.

It is a general principle that no person shall be entitled to redeem but he who can show a title to the estate of the mortgagor (*e*), but if there be fraud or collusion to the detriment of third parties, as if assignees (*f*), or executors (*g*), or trustees (*h*), refuse to enforce their right, creditors or other parties interested may file their bill for relief.

The mortgagor must make all persons interested in the mortgage parties to his bill. As where a mortgagee of a term bequeathed it to trustees, upon trust to sell and divide the produce between thirteen persons by name, it was held all the *ces-*

(*e*) Lomax *v.* Bird, 1 Vern. 182; Bickley *v.* Dorrington, and Monk *v.* Pomfret, 2 Eq. Ca. Ab. 605; Barnard. 30; James *v.* Biou, 3 Swans. 237.

(*f*) Franklyn *v.* Fern, Barnard. Rep. 30.

(*g*) *Vide supra.*

(*h*) Troughton *v.* Binkes, 6 Ves. 573.

tuis que trust were necessary parties to a bill for redemption, although by the will the trustees had authority to give discharges for the purchase money (*i*). And if the mortgagor be not a party to the deed of assignment of the mortgage to another party, he must make the original mortgagee a party to his bill, for the purpose of making him account (*k*).

These general observations being premised, it will be necessary more particularly to consider the different parties who are entitled to redeem.

An equity of redemption will, in its descent, devolve in like manner as the legal estate, that is, to the common law, or customary heir, according to the circumstances of the case (*l*); to such heir the right of redemption of course belongs; and upon a bill to redeem, by an heir at law, a *primâ facie* title is sufficient (*m*).

The *hæres factus*, or devisee of the equity of redemption, is entitled to redeem, and he need not make the heir at law of the mortgagor a party, unless he claims to have the will established (*n*).

The assignee of the equity of redemption may also redeem, although the equity has been abandoned for a considerable time. Of this an instance

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(*i*) Osbourn *v.* Fallows, 1 Russell & Milne, 741.

(*k*) *Vide infra.* (*l*) *Vide supra*, p. 49.

(*m*) Pym *v.* Bowreman, 3 Swans. 241, note.

(*n*) Lewis *v.* Nangle, 2 Ves. 431; Phillips *v.* Hele, 1 Ch. Rep. 190.

frequently referred to, is to be found in a case before Lord Hardwicke (*o*), in which a person, who is there styled a prowling assignee, bought in, for a very inconsiderable sum, the equity of redemption of which had been abandoned for fifteen years. The Court decreed a redemption on terms, namely, that on taking the account before the Master, he should be allowed to surcharge and falsify only (*p*), and that the interest should be calculated at 5*l.* per cent., although the usual rate was then much higher.

The assignees of a bankrupt may redeem (*q*).

Judgment-creditors may redeem, although the judgment be with a stay of execution (*r*); but if leaseholds be in mortgage, a judgment-creditor must take out execution before he can redeem (*s*); for, until then, the judgment is no lien on the leaseholds (*t*).

A creditor was permitted to redeem whose debt was considered to be released by operation of law, and to subsist in equity only, as in a case (*u*) of a bond given by husband before marriage to his wife for a sum of money payable after his decease.

(*o*) Anon. 3 Atk. 314.

(*p*) As to this, *vide infra*, Chap. Of Accounting.

(*q*) Franklyn *v.* Fern, *supra*.

(*r*) Stonehewer *v.* Thompson, 2 Atk. 440.

(*s*) Shirley *v.* Watts, 3 Atk. 200; Angel *v.* Draper, 1 Vern. 399.

(*t*) *Vide supra*, p. 76.

(*u*) Acton *v.* Pierce, 2 Vern. 480; Cha. Prec. 237.

Tenant by *elegit* or statute (*v*), and sequestrators (*x*), may redeem.

The crown, or its grantee, may redeem on forfeiture of the equity of redemption (*y*).

A tenant, it is said, may redeem, or procure one to redeem for him (*z*).

Although a voluntary conveyance be, under the 27th of Elizabeth, fraudulent and void against a mortgagee, who is, *pro tanto*, a purchaser, nevertheless the party claiming under the deed is entitled to redeem (*a*).

If a mortgage be made in exercise of a power, the persons claiming in default of appointment may redeem (*b*).

A dowress (*c*), tenant by curtesy (*d*), and jointress (*e*), may redeem.

Subsequent mortgagees may redeem (*f*); but

(*v*) Bunbury, 347; 2 Eq. Ca. Ab. 594.

(*x*) Fawcett *v.* Fothergill, Dick. 20.

(*y*) Attorney-General *v.* Crofts, 1 B. P. C. 222; Lovell's case, 1 Salk. 85; 1 Eden, 210.

(*z*) Keech *v.* Hall, Doug. Rep. 22.

(*a*) Rand *v.* Cartwright, 1 Ch. Ca. 59; Thorne *v.* Thorne, 1 Vern. 182; Barthrop *v.* West, 2 Ch. Rep. 62.

(*b*) Innes *v.* Jackson, 16 Ves. jun. 367.

(*c*) Palmes *v.* Danby, Pre. Ch. 137. (*d*) Bunb. 347.

(*e*) Howard *v.* Harris, 2 Ch. Ca. 171; 2 Vent. 363.

(*f*) Fell *v.* Brown, 2 B. C. C. 276.

they must make the mortgagor or his heir party to the bill (*g*); and if the first incumbrancer be not in possession, they must pay him all the arrears of interest (*h*). If the first mortgagee does not appear at the hearing, the subsequent mortgagee will be allowed to make the decree absolute against him (*i*).

Tenant for life, or remainder-man, or reversioner, may redeem (*j*).

If a term of years be purchased, in the joint names of the husband and wife, and the husband mortgage it, and afterwards die in the life-time of his wife, the creditors of the husband may, it seems, redeem (*k*).

If the wife's leasehold be mortgaged by husband and wife, and the husband covenants to pay the debt, and afterwards reduces the amount of the debt out of his money, and dies, leaving his wife the survivor, the wife may, it seems, redeem, on placing the husband's estate in the situation of the mortgagee to the amount of the sum paid by the husband (*l*).

(*g*) Farmer *v.* Curtis, 2 Sim. 466; Ramsbottom *v.* Wallis, App.

(*h*) 1 Ves. 268.

(*i*) Cottingham *v.* Lord Shrewsbury, 5 Simons, 395.

(*j*) Aynsley *v.* Reed, Dick, 249.

(*k*) Watts *v.* Thomas, 2 P. Wms. 365.

(*l*) Pitt *v.* Pitt, 6 Sim. 180. *Sed quære*, if the husband's representatives would not have been absolutely entitled to the equity of redemption if it had been reserved to *him*, the estate being a chattel real, of which he could have absolutely disposed without his wife's concurrence. *Nota.*—In the Register Book the case is entered as

It was decided that a protestant heir might redeem a mortgage made by a papist (*l*).

A committee of a lunatic may redeem for the benefit of the heir (*m*).

And a guardian of an infant may apply the rents in discharge of the principal of the mortgage (*n*), because the mortgage is a subsisting charge and lien on the estate (*o*).

Prior to the passing of the recent Statute of Limitations (*p*), *the time* within which the equity of redemption would be allowed, was a matter for consideration, it being repeatedly laid down in the books that there was no absolute time which would bar the right of redemption; and prior to the late statute the point might have been so conceded, for it being determined that an equity of redemption was not within the old statute of limitations, and that the Court would always admit an explanation of the circumstances occasioning the delay, it might have been justly said that there was no positive and fixed period beyond which redemption could not be obtained. Nevertheless, the same reasons which induced the legislature to limit the period for trying at law the right of possession to an estate, operated as forcibly on the consideration of equity for limiting the right of redemption of the equitable estate; and, accordingly,

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(*l*) Jones *v.* Meredith, Bunbury, 346; Comyn's Rep. 661; *et vide* Co. Litt. 391 (a), n. 346.

(*m*) *Ex parte* Grimstone, Amb. 706.

(*n*) Palmes *v.* Danby, Pre. Ch. 137.

(*o*) *Vide supra.*

(*p*) 2 & 3 Will. IV. c. 27.

after a considerable conflicting of opinions it was settled, that the courts of equity would be regulated in this respect *by analogy* to the old statute of limitations (*q*), and that after twenty years' abandonment by the mortgagor (*r*), the right of redemption should be lost, unless the mortgagor could bring his case within one of the exceptions mentioned in that statute, namely, imprisonment (*s*), infancy (*t*), coverture (*u*), or being beyond the seas (*x*), (not having absconded (*y*),) or nonsane memory; in any one of which cases, the Courts, in further analogy to that statute, gave ten years after the disability was removed (*z*). But if the time once began to run, a subsequent legal disability, in analogy to the decisions at law, would not have been sufficient to stop it (*a*).

The analogy to the statute, however, was not complete, for it has been decided that the equity of redemption would be barred by twenty years non-claim, although the mortgagee entered into possession in the lifetime of a party who was entitled to the equity of redemption, as tenant for life only, and although the person entitled to the equitable estate in remain-

(*q*) 21 Jac. I. cap. 16.

(*r*) Corbett *v.* Barker, 1 Anstr. 138; 3 Anstr. 755.

(*s*) *Vide* Jenner *v.* Tracey, 3 P. Wms. 287, n.

(*t*) *Vide supra.*

(*u*) Cornel *v.* Sykes, 1 Ch. Rep. 193; Price *v.* Copner, 1 Sim. & Stu. 347.

(*x*) Jenner *v.* Tracey, *supra.* (*y*) *Vide supra.*

(*z*) White *v.* Ewer, 2 Vent. 340; Belch *v.* Harvey, 3 P. Wms. 287, n. *Et vide* Beckford and others *v.* Wade, 17 Ves. 99.

(*a*) Floyd *v.* Mansel, Gilb. Rep. in Eq. 185; Saint-John *v.* Turner, 2 Vern. 419; Knowles *v.* Spence, Moseley, 225; 1 Eq. Ca. Ab. 315; Anon. 2 Atk. 383; Corbett *v.* Barker, 1 Anstr. 138; 3 Anstr. 755.

der filed his bill within five years after the death of the tenant for life (*b*).

The like principle prevailed in the case of a conveyance by husband alone of the wife's freehold estate against the heir of the wife, claiming within twenty years after the death of the husband (*c*).

In the case of Cholmondeley against Clinton (*d*), the question was agitated between two parties, claiming the same equity of redemption, whether an adverse possession by one of the parties, by taking possession and paying interest on the mortgage for twenty years, would be an absolute bar to the other party by length of time; and on appeal to the House of Lords, it was finally decided that such adverse possession was a complete bar, and the bill was dismissed.

The statute 3 & 4 Will. IV. cap. 27 (*e*), has now enacted, that after the 31st day of December, 1833, no person claiming any land or rent in equity, shall bring any suit to recover the same but within the period during which, by virtue of the provisions thereinbefore contained, he might have made an entry, or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity.

And that when any land or rent shall be vested in

(*b*) Harrison v. Hollins, 1 Sim. & Stu. 471.

(*c*) Ashton v. Milne, 6 Sim. 377, overruling Price v. Copner, 1 Sim. & Stu. 374.

(*d*) 2 Meriv. 173; 2 Jac. & Walk. 1; 4 Bli. 7.

(*e*) Sec. 24, 25, and 26.

a trustee upon any *express* trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of that act, at, and not before, the time at which such land or rent shall have been conveyed to a *purchaser for a valuable consideration*, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

And that in every case of a *concealed* fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been first known or discovered. But that nothing therein contained shall enable any owner of lands or rents to have a suit in equity for recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time he made the purchase did not know, and had no reason to believe, that any such fraud had been committed.

The mortgagee, it was held, might plead the statute of limitations in bar of the right to redeem (*f*), or might demur (*g*). If he demurred, the plaintiff

(*f*) Aggas v. Pickerell, 3 Atk. 225.

(*g*) Hodle v. Healey, 1 Ves. & B. 536; Hardy v. Reeves, 4 Ves. 479; 6 Maddox, 181.

might shew special circumstances on the face of the bill, for overruling the demurrer (*h*); and if he pleaded, the plaintiff might reply to the plea, or amend his bill, or might prove himself to be within the exceptions (*i*).

There were, however, many circumstances beside the legal disabilities before noticed, which would take the case out of the statute; amongst which were the following.

If there was fraud or oppression in the transaction (*j*), or if the mortgagee used unfair means to clog the redemption of the mortgage (*k*), or the like.

Any act of the mortgagee, acknowledging the mortgage as subsisting within twenty years of the filing of the bill, would take it out of the rule (*l*), although the transaction were not with the mortgagor or his heirs (*m*), or it were a mere private account kept by the mortgagee of the profits of the estate, in which he treated it as redeemable (*n*). The accounts kept by a receiver of the estate were not however sufficient (*o*). An account kept with the mortgagor, or his heirs, within twenty years, would save the equity of redemption, whatever might have

(*h*) *Vide supra.* (*i*) Aggas *v.* Pickerell, *supra.*

(*j*) Spurgeon *v.* Collier, 1 Eden, 55.

(*k*) Ord *v.* Smith, Select C. in Ch. 9.

(*l*) Hodle *v.* Healey, 6 Madd. 181; Price *v.* Copner, 1 S. & S. 347.

(*m*) Hansard *v.* Hardy, 18 Ves. 455.

(*n*) Fairfax *v.* Montague, cited 2 Ves. jun. 84; Campbell *v.* Beckford, cited 4 Ves. 474; Lake *v.* Thomas, 3 Ves. 17—22.

(*o*) Barron *v.* Martin, Coop. C. C. 189, &c.

been the length of possession by the mortgagee (*p*). But a mere demand by the mortgagor without process or acknowledgment by the mortgagee was not sufficient (*q*). A conveyance by the mortgagee or his heirs of the lands, subject to the equity of redemption, was held a clear acknowledgment (*r*), although it is said that the words "subject to the subsisting equity of redemption, *if any*," was not (*s*). And in a case in which the purchaser from the husband of the equity of redemption of the wife's estate, obtained a conveyance of the outstanding legal estate by a deed which noticed the payment of the mortgage debt by the purchaser to the mortgagee, it was held a sufficient acknowledgment of the mortgage to give the heir of the wife a right to redeem within twenty years from the date of the deed (*t*). A surrender of copyholds by a mortgagee to the use of his will, was said to be demonstrative of intention neither way (*u*); but this observation did not of course apply if there was any reference to the subsisting equity. If the mortgagee devised the lands as his mortgaged estate (*v*), or alluded to the mortgage as by a disposition of the money, *if the mortgage should be redeemed*, there would be a sufficient acknowledgment (*x*). On the like principle, a redemption was allowed after forty years' possession,

(*p*) Proctor *v.* Cowper, 2 Vern. 377; Anon. 2 Atk. 333.
(*q*) 1 Ves. & Bea. 540.
(*r*) Smart *v.* Hunt, 4 Ves. 478, n.
(*s*) Hardy *v.* Reeves, *ibid.* 480. (*t*) Price *v.* Copner, *supra.*
(*u*) *Vide supra; et vide* Martin *v.* Mowlin, 2 Burr. 970.
(*v*) 3 Atk. 314.
(*x*) Ord *v.* Smith, Sel. Ca. Ch. 9; 2 Eq. Ca. Ab. 600.

on evidence of a contract entered into within seven years preceding the filing of the bill by the heir of the mortgagee, for purchase of the equity of redemption (*y*). Parol evidence was admissible to affect the mortgagee, but it must have been clear and unimpeachable (*z*).

The case would be also taken out of the statute if the mortgagee submitted to be redeemed (*a*).

Or if the mortgagor, or his heir, remained in possession of any part of the estate (*b*).

Or if the time was otherwise well accounted for, as in a case in which it appeared that there had been a promise that the mortgagor should be at liberty to redeem after twenty-seven years; a redemption was allowed after forty-one years, being only fourteen years from the time allowed (*c*): and as in another case (*d*), in which redemption was allowed fifty years after the mortgage, and after forty-seven years' possession by the mortgagee, and five ejectments at law to try the title, and refusal by four several answers to account, the time being accounted for by the legal proceedings. If, however, a mortgagor filed his bill to redeem, and obtained a decree to account, he

(*y*) Conway *v.* Shrimpton, 5 B. P. C. 187.

(*z*) Whiting *v.* White, 2 Cox, 295; Perry *v.* Marston, 2 B. C. C. 397, more fully reported in Whiting *v.* White.

(*a*) Proctor *v.* Oates, 2 Atk. 140.

(*b*) Rakestraw *v.* Brewer, Sel. Cha. Ca. 55; 2 P. Wms. 511; Moseley, 189.

(*c*) White *v.* Pigeon, Tothill, 135.

(*d*) Palmer *v.* Jackson, 1 B. P. C. 281.

must have prosecuted his suit, or in twenty years he would be barred (*e*).

It was also held, that no time would bar the redemption of a Welch mortgage (*f*), or if the mortgage-deed contained an agreement that the mortgagee should hold until the mortgage was satisfied (*g*), unless on an account taken of the rents and profits it appears that the mortgagee had been in possession upwards of twenty years since the mortgage-debt was fully paid (*h*).

Even if the equity of redemption was actually released by the mortgagor to the mortgagee, evidence would be admitted that the release was made upon a secret trust for his benefit (*i*), or that it was not intended to be an absolute sale (*j*).

In order to render the law on this subject more certain and precise, the 2 & 3 Will. IV. cap. 27 (*k*), has enacted, that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in

(*e*) Saint-John *v.* Turner, 2 Vern. 418.

(*f*) Howell *v.* Price, Gilb. Eq. Rep. 106; Pre. Cha. 423; 1 P. Wms. 291.

(*g*) Ord *v.* Heming, 1 Vern. 418; Yates *v.* Hambly, 2 Atk. 359.

(*h*) Yates *v.* Hambly, *supra; et vide* 1 Mer. 125, and *supra*, Cap. Welch Mortgages.

(*i*) Morly *v.* Elways, 1 Ch. Ca. 107.

(*j*) Vernon *v.* Bethell, 2 Eden, 110. (*k*) Sec. 28.

the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person *in writing, signed by the mortgagee or the person claiming through him,* and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons, but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeazance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors, a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent, and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some

estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

A very important class of cases is next to be considered, viz. those in which the question has been whether it is intended by the parties making the mortgage, that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses.

These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage-deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be *a resulting trust* for the benefit of the wife and her heirs(*k*), and that the wife or her heir shall redeem, and not the heir of the husband(*l*). The same principle applies, if the wife concur in a

(*k*) *Sed vide* page 629, note (*l*), in the case of the wife's leasehold mortgaged by husband.

(*l*) *Vide* Huntingdon *v.* Huntingdon, 2 Vern. 437; Corbett *v.* Barker, 1 Anst. 138; 3 Anst. 755; Ruscombe *v.* Hare, 6 Dow. 1; 2 Bligh, 192.

mortgage of her jointure lands(*m*), or of lands on which she has right of dower (*n*); in which last-mentioned cases, the general rule is, that her concurrence to let in the mortgage, shall not prejudice her rights, although the equity of redemption be limited to the husband and his heirs; but she shall, on his death, be admitted to redeem.

Lord Redesdale, in the case of Innes *v.* Jackson, before the House of Lords (*o*), observed, that it must be now admitted, as a general principle to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife join in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure, or dower, out of the estate, and there is a mere *reservation* in the proviso for redemption, which would carry the estate from the person who was owner at the time of executing the mortgage; or where the words admit of any ambiguity, there is a *resulting trust* for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. Lord Eldon appears to have been inclined (for the wife's protection) to have carried the principle even to the extent of the opinion which his lordship conceived was entertained by Lord Thurlow (*p*), viz. that in order to dispose of the equity of

(*m*) Cotton *v.* Cotton, 2 Ch. Rep. 72; Brend *v.* Brend, 1 Vern. 213; Skin. 338; 1 Eq. Ca. Ab. 62; 1 Bligh, 115, 117; Southcoat *v.* Manory, Cro. Eliz. 744.

(*n*) Jackson *v.* Parker, Amb. 687.

(*o*) See Innes *v.* Jackson, 1 Bligh, 126.

(*p*) *Ibid.* 135; *et vide* Ruscombe *v.* Hare, *supra*.

redemption of the wife in an estate, it was absolutely necessary there should be in the *recitals* of the instrument some expression that the parties meant it so; that it was not enough to collect the intention from the limitations, but there must be something more upon the face of the deed to lead the wife to understand what those limitations were; but his Lordship allowed that it seemed to him, on looking into the cases, that such a proposition could not be supported. It is, perhaps, to be regretted that the opinion of Lord Thurlow could not be sustained to its full extent. The case of Rowel *v.* Walley (*p*), is, indeed, a direct authority that the limitations alone will be sufficient for the purpose of altering the wife's equity. In that case, the mortgage was of the lands of the wife: the proviso for redemption was, that if the husband and wife, or either of them, or their heirs, &c., should pay to the mortgagee, &c. then the fine thereby agreed to be levied should enure to the use of the husband and wife, and the longest liver of them, with remainder to the right heirs of the husband for ever. The husband died, leaving a son and heir. The widow intermarried with the plaintiff, and on bill filed by Rowel and wife against the heir of the mortgagee, and also against the heir of her former husband for redemption, the Court directed that the plaintiff, as tenant for life, should pay one-third, and that the heir at law of her former husband should pay two-thirds of the mortgage-money as being entitled to the reversion in fee (*q*).

(*p*) 1 Ch. Rep. 116.

(*q*) As to the proportions between Tenant for Life and Remainderman, *vide infra*, p. 645.

The case of Innes v. Jackson (*r*) was decided in Chancery in accordance with Lord Thurlow's notion, viz. that there should be sufficient evidence in the recitals to inform the wife of the alteration in the limitations. In that case, lands were limited to the use of the husband and wife for their lives, with remainder to their children in strict settlement, with remainder to the wife in fee, with power to the husband and wife to revoke, and to limit new uses. All the issue of the marriage died infants in the lifetime of their parents. In 1745 the husband and wife demised the lands to Child, for 1000 years, subject to redemption, on payment by husband and wife, or either of them, or their or either of their heirs, &c. of 200*l.* They afterwards borrowed 200*l.* more, and charged it on the term for years, with a similar proviso for redemption. They also covenanted to levy a fine which should enure to the use of the mortgagee for the term, subject to the proviso, and after the expiration, or sooner determination thereof, to the use of the husband and wife for their lives, with remainder to the heirs of their bodies, with remainder to the right heirs of the *survivor*. The husband survived; the defendant was his devisee; the plaintiff claimed as the heir at law of the devisee of the heir at law of the wife. The Court decided in favour of the title of the wife. Against this judgment, the heir at law of the husband appealed to the House of Lords, and the decree was reversed (*s*).

(*r*) 16 Ves. 356. (*s*) 1 Bligh.

In a more recent case (*t*), in which the estate of the wife was conveyed by way of mortgage in fee, and the equity of redemption was limited to such uses as the husband and wife should jointly appoint, and in default of such joint appointment, then as the wife should by will appoint, and in default of any such appointment, to the wife in fee, the Master of the Rolls doubted if there was any alteration of the wife's estate.

The case of Ruscombe *v.* Hare (*u*), in the House of Lords, shows strongly the force of the rule; in that case, the estate devolved on the wife, already charged with the mortgage, and the husband paid a considerable sum in keeping down the interest; he and his wife afterwards joined in deeds of conveyance and fine to the mortgagee, reserving the equity of redemption to the husband in fee. After his death, the heir of the wife obtained a decree for redemption against his heir, and against the representatives of a purchaser of part of the estate from him.

If a mortgage be made under a power of appointment, it is a revocation of the subsisting uses *pro tanto* (*x*); and therefore whether the form of the proviso for redemption be, that on payment of the mortgage-money the appointment shall be void, or the estate shall be reconveyed to the old uses, or

(*t*) Martin *v.* Mitchell, 2 Jac. & Walk. 413.

(*u*) 2 Bligh, 192.

(*x*) *Vide supra*, p. 61.

shall be conveyed to the use of the mortgagor, his heirs and assigns; the equity of redemption will, in all respects, correspond with the title prior to the mortgage, unless on the face of the instrument an ulterior intention be indicated inconsistent with a future exercise of the power (*z*).

It is, in the next place, requisite to consider in what *method* redemption is to be effected where there are several parties entitled.

Redemption will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the Court will decree in detail, that the second shall redeem the first, the third the second, and so on (*a*).

If the equity of redemption be limited to uses, the remainder-man may file his bill to redeem (*b*), but he must give the first tenant for life and intermediate remainder-men an option of redeeming according to their priorities. And if creditors come in to redeem, they must make the persons legally entitled to the equity of redemption, such as executors or assignees of a bankrupt, parties to their bill (*c*).

(*z*) *Vide* 16 Ves. 367; Powell on Mortgages, 346; Patch on Mortgages, 176; and *supra*, page 621.

(*a*) Arcedechne *v.* Bowes, 3 Mer. 216, n.; *et vide* Ramsbottom *v.* Wallis, App.

(*b*) *Vide* Corbett *v.* Barker, 1 Anstr. 138; 3 Anstr. 755.

(*c*) Barnard. Rep. 33.

It was formerly the rule, that a remainder-man or reversioner could compel the tenant for life to contribute to the redemption (*d*), and that the tenant for life should pay one-third, and the remainder-man two-thirds (*e*); and in one case, it was decreed, that the tenant for life should contribute two-fifths, and the remainder-man three-fifths (*f*). This, however, is now entirely altered, the rule being that the tenant for life shall be compelled only to keep down the interest during his life (*g*): but if the tenant for life refuse to redeem, the remainder-man may, by redeeming the mortgage, and ejecting the tenant for life, and taking possession of the profits, or by filing a bill of foreclosure, compel the tenant for life to come in and contribute, or give up the possession of the estate (*h*).

Subsequent mortgagees cannot redeem without making the mortgagor, or his heir, a party to the bill (*i*); and if the heir be not within the jurisdiction of the Court, the cause cannot proceed, because the decree is, that the second mortgagee shall redeem the first, and the mortgagor, or his heir, shall redeem the second or be foreclosed (*j*). This principle is

(*d*) Hayes *v.* Hayes, 1 Cha. Ca. 224; Cornish *v.* Mew, *ibid.* 271; Clyat *v.* Batteson, 1 Vern. 404; Ballett *v.* Sprainger, Pre. Ch. 62; Rowel *v.* Walley, *supra; et vide* 3 Anstr. 757.

(*e*) *Vide supra.*

(*f*) James *v.* Hales, 2 Vern. 268; Pre. Ch. 44.

(*g*) White *v.* White, 9 Ves. 560; *et vide supra*, page 445.

(*h*) *Vide* 3 Anstr. 757.

(*i*) Fell *v.* Brown, 2 B. C. C. 276; Ramsbottom *v.* Wallis, App.

(*j*) *Vide supra; et vide* Palk *v.* Clinton, 12 Ves. 48; Woodcock *v.* Meyne, cited *ibid.* 59; Ramsbottom *v.* Wallis, *supra.*

carried so far, that if a man mortgage an entire estate to *A.* which, on the death of the mortgagor, devolves on two different persons, and one of those persons mortgages his part to another, and the mortgagee of that part file his bill to redeem, he must make not only the first mortgagee, and his own immediate mortgagor, but also the owner of the other share, parties to the bill, because he must redeem the first mortgagee *in toto* (*k*), and the other party, so far as respects part of the estate, is standing in the place of the original mortgagor (*l*).

If two estates are comprized in one mortgage, and the equities of redemption devolve on different parties, the equitable owner of one estate cannot maintain his bill for redemption without making the equitable owner of the other estate a party to the suit (*m*).

It has become a settled rule in equity that a mortgagor must, after default made by him in payment of the money according to the proviso in the mortgage-deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage (*n*) unless the mortgagee has demanded or taken any steps to compel payment; in which latter case, not any notice is requisite; and it has been considered that if the mortgagor be willing to pay six months' interest in advance, notice will be unnecessary (*o*);

(*k*) 12 Ves. 61.
(*l*) Palk *v.* Clinton, *supra.*
(*m*) Cholmondeley *v.* Clinton, 2 Jac. & Walk. 133.
(*n*) *Vide supra;* and vol. 2. Ca. and Opin. page 51.
(*o*) Vol. 2. Ca. and Opin. 51.

but as interest is by law a remuneration for delay of payment of the principal, if the money so to be paid in addition to the principal is to be considered as interest, it could hardly be with safety accepted; but regarding it as a consideration for the relinquishment by the mortgagee of his right to notice, it is thought the payment will not fall within the laws against usury, and no danger will be incurred by the transaction.

CHAPTER II.

OF ACCOUNTING.

WHETHER the bill be filed by the mortgagor for redemption, or by the mortgagee for foreclosure, the order of the Court is, that it be referred to the Master to take an account of principal, interest, and costs, due to the mortgagee. But if the reference be made on application of the mortgagor (*a*), under the remedial Act of the 7th Geo. II., cap. 20, he will be considered bound by the sum charged in the bill by the mortgagee, and it will not be open to the Master to admit evidence to the contrary (*b*).

The usual decree of the Court is, that the Master shall take an account of what the mortgagee has received, or might have received, if it had not been for his own default; but any sums received subsequent to the decree, must be brought into the account (*c*), although the decree does not, in words, extend to future rents.

It is the privilege of the mortgagor (*d*) not to be bound to account for the rents and profits while

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(*a*) *Vide supra.*
(*b*) Huson *v.* Hewson, 4 Ves. 103, *et vide supra.*
(*c*) Bulstrode *v.* Bradley, 3 Atk. 582.
(*d*) *Vide supra*, page 395.

in possession; and, it seems, there is no instance to the contrary, however insufficient the security may prove (*e*).

The mortgagee is subject to an account from the time he takes possession; but the Master must not take annual rests of rents received, unless specifically directed by the decree (*f*). The Court will, however, it seems, direct annual rests, if there be no interest in arrear when the mortgagee takes possession (*g*), and in certain cases, in which the rents considerably exceed the interest (*h*), but in general the Court does not direct annual rests (*i*), or for *part* of the time (*k*). If the mortgagee was paid in full at the time of filing the bill, he will be charged with interest on the balance in his hands (*l*), and with costs (*m*).

Annual rests will be decreed against a mortgagee in possession from the time it is ascertained the debt was paid off, although rests were not directed by the previous orders and decrees under which the accounts were taken (*n*), and will be directed as well in the

(*e*) Colman *v.* Duke of St. Albans, 3 Ves. 25; *Ex parte* Wilson, 2 Ves. & Bea. 252; *et supra.*

(*f*) Webber *v.* Hunt, 1 Madd. 13; Davis *v.* May; Fowler *v.* Wightwick, *cited ibid.*; Donovan *v.* Fricker, 1 Jacob, 168.

(*g*) Shephard *v.* Elliott, 4 Madd. 254.

(*h*) Gould *v.* Tancred, 2 Atk. 533; Donovan *v.* Fricker, *supra.*

(*i*) Davis *v.* May, Cooper's Rep. 240, and the several cases there mentioned.

(*k*) *Ubi supra*; *et vide* Latter *v.* Dashwood, 6 Sim. 462.

(*l*) Quarrell *v.* Beckford, 1 Madd. 269.

(*m*) Binnington *v.* Harwood, Turner & Russell, 485.

(*n*) Wilson *v.* Metcalfe, 1 Russell, 630.

case of an occupation rent as on an account of rents and profits actually received (*o*).

The proper mode of taking the account with rests appears to be, that as soon as the mortgagee has received a sum exceeding the amount of interest, a rest should be made, and from that date the subsequent annual rests should be computed, so that if the date of the mortgage deed be in July, and the mortgagee received sums in February exceeding the interest then due, a rest should be taken in February, and annual rests be thenceforth computed from that time, and not from July (*p*).

The mortgagee has on redemption a right to principal, interest, and costs, but there must be a special order for an allowance for improvements (*q*), and he may have interest upon interest if confirmed by the mortgagor (*r*). A mortgagee cannot charge for his personal trouble (*s*) although there be a private agreement for that purpose (*t*); but there may be an agreement between them for the appointment of a receiver, which will be allowed; and if the estates lie dispersed, and at a distance from the mortgagee's residence, so that if the estate were his own, he would employ a receiver to collect the rents, he may, it seems, appoint a receiver without such agreement (*u*).

(*o*) Wilson *v.* Metcalfe, 1 Russell, 630.
(*p*) Binnington *v.* Harwood, *supra.*
(*q*) Knowles *v.* Spence, Moseley, 226.
(*r*) Blackburne *v.* Warwick, 2 Younge & C. 92.
(*s*) *Supra*, page 472.
(*t*) French *v.* Baron, 2 Atk. 120; *et vide supra.*
(*u*) *Vide supra.*

A mortgagee shall not account for any imaginary profits which he might have made of the land, but only for the actual rent; unless there be fraud or wilful default in his conduct, as if he turned out a sufficient tenant, or refused higher rent than what he actually received, or the like (*v*); but in taking the account, if the mortgagor prove the estate to have been let at a certain rent at any time during the mortgagee's possession, the onus will be thrown on the mortgagee, to shew that such was not the rent during the whole period of his possession (*x*).

If a mortgagee act *malâ fide*, either with regard to subsequent incumbrancers or creditors of the mortgagor, or with regard to the mortgagor himself, he will be personally responsible; as, if he be guilty of gross mismanagement in the cultivation of the estate (*y*), or if he permit the mortgagor to make use of his mortgage as the first incumbrance, to keep out other creditors: in instance of which a mortgagor having become bankrupt, and the mortgagee refusing to enter, the assignees brought ejectment, the mortgagee permitted the bankrupt to take the profits, and to fence against the assignees with the mortgage, and it was decreed that the mortgagee should be charged with profits from the time of the ejectment delivered (*z*). So, if the mortgagee enter, and afterwards permit the mortgagor to receive the rents, on a bill by a subsequent creditor to redeem, he will be charged with all

(*v*) *Vide supra*; Hughes *v.* Williams, 12 Ves. 493.
(*x*) Blacklock *v.* Barnes, Sel. C. C. 53.
(*y*) Wragg *v.* Denham, 2 Younge & C. 117.
(*z*) Chapman *v.* Tanner, 1 Vern. 267.

the profits he might have made after his entry (*a*). But the mortgagee will not, in such case, be answerable for profits which he might have made previously to the date of the next incumbrance (*b*); nor, indeed, it should seem, for the profits which he might have received prior *to notice* of such subsequent incumbrance (*c*). If the first mortgagee, with notice of a subsequent incumbrance, concur with the mortgagor in a sale, and permit the mortgagor to receive the money, it shall sink so much of the mortgage-debt as against the second mortgagee (*d*). In another case, in which the mortgagee having brought ejectment, and then refused to take out execution, and the rent being in arrear, the mortgagor could not eject the tenant by reason of the mortgagee's judgment, the Court ordered that, unless the mortgagee took out execution before the end of the term, he should be answerable for the profits, as in case of wilful default (*e*).

The account taken before the Master, between the mortgagor and first mortgagee, will be binding on subsequent incumbrancers, although they were not parties to the suit (*f*). In like manner, an account stated between the mortgagee and tenant for

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(*a*) Cropping *v.* Cooke, 1 Vern. 270; Bentham *v.* Haincourt, Pre. Ch. 30.

(*b*) Maddocks *v.* Wren, 2 Ch. Rep. 109.

(*c*) *Sed quære.*

(*d*) Bentham *v.* Haincourt, *supra.*

(*e*) Duke of Buckingham *v.* Sir R. Gayer, 1 Vern. 258.

(*f*) Needler *v.* Deeble, 1 Ch. Ca. 299; Williams *v.* Day, 2 Ch. Ca. 32; Sherman *v.* Cox, 3 Cha. Rep. 85; Crisp *v.* Heath, 7 Vin. Ab. 52.

life, will be binding on a contingent remainder-man coming afterwards into *esse* (*g*); and an account stated between the mortgagee and assignees of a bankrupt, will be binding on all parties claiming under the bankrupt (*h*); and an account taken during minority, will be binding on the infant (*i*). In every case the account is liable to be opened for fraud, or the party will be allowed, in case of specific error alleged and proved, to surcharge and falsify; he cannot, however, go into the general account (*k*): but, if he be at liberty to surcharge and falsify, he is not merely confined to errors in fact, but may, it is said, take advantage of errors in law (*l*).

There appears no legal objection to an attorney taking a mortgage-security for his bill of costs, pending the litigation; but if the security be taken for an unsettled account, a bill for a general account will at any time lie against him (*m*); and although it is a rule that a settled account shall not be opened unless particular errors are pointed out, yet, if on a bill filed by a client against his attorney alleging error gene-

(*g*) Allen *v.* Papworth, 1 Ves. 164.

(*h*) Knight *v.* Bamfield, 1 Vern. 179.

(*i*) Badham *v.* Odell, 4 B. P. C. 347.

(*k*) Needler *v.* Deeble; Williams *v.* Day; Sherman *v.* Cox; Crisp *v.* Heath; Allen *v.* Papworth; Knight *v.* Bamfield; Badham *v.* Odell, *supra*; *et vide* Taylor *v.* Haylin, 2 B. C. C. 310; Johnson *v.* Curtis, 3 B. C. C. 266; Drew *v.* Power, 1 Scho. & Lef. 192; Chambers *v.* Goldwin, 9 Ves. 266, and Vernon *v.* Vawdry, 2 Atk. 119.

(*l*) Roberts *v.* Kuffin, 2 Atk. 112.

(*m*) Detellin *v.* Gale, 7 Ves. 583.

rally, in an account settled between them, the attorney admit the fact, the account will be opened (*n*). And if a solicitor having taken a mortgage security charges poundage in his account on the amount of rents received, without informing his client that he has legally no right so to do, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge (*o*).

If an account be taken before the Master, and no further proceedings are had, and afterwards a second account is directed, it will be taken from the foot of the first account (*p*).

A mortgagor is not bound by an account (to which he is not a party) stated between the mortgagee and his assignee (*q*). The consequence is, that an assignee is, in such case, liable to account for all the profits received by the mortgagee, and the *intermediate assignees*, and the mortgagor need make the last assignee only a party to his bill (*r*).

If a mortgagee in possession assign his mortgage without the concurrence of the mortgagor, to an insolvent person, he will be liable for the rents as well before as after assignment, because he is in some sort a trustee of the estate (*s*).

(*n*) Matthews *v.* Wallwyn, 4 Ves. 118.

(*o*) Langstaffe *v.* Fenwick, 10 Ves. 405; *et vide* Wragg *v.* Denham, *supra*.

(*p*) Proctor *v.* Cowper, 2 Vern. 377.

(*q*) *Supra*.

(*r*) Chambers *v.* Goldwin, 9 Ves. 268, 269.

(*s*) *Vide supra*.

A mortgagee in possession of open mines is not bound to advance more money on them than a prudent owner would on his own estate (*t*).

A mortgagee will not be allowed his expenses in opening mines or quarries, but must speculate at his own hazard (*u*); but he will be allowed all his fair expenses in renewing leases, necessary repairs, lasting improvements and costs (*x*).

(*t*) Rowe *v.* Wood, 2 Jac. & Walker, 553.

(*u*) Hughes *v.* Williams, 12 Ves. 492.

(*x*) *Vide supra;* and Thorne *v.* Newman, Finch, 38; Lomax *v.* Hide, 2 Vern. 185; Quarrell *v.* Beckford, 1 Madd. 281; Trimleston *v.* Hamill, 1 Ball & Beatty, 385.

CHAPTER III.

OF PURCHASING INCUMBRANCES.

If a stranger become the purchaser of an incumbrance for less than its actual value, he will, as against the mortgagor or his heirs (*a*), be entitled to require payment of the full debt.

It has been questioned whether as against a *bonâ fide* purchaser of the estate, without notice of the incumbrance (*b*), or as against subsequent creditors (*c*), the purchaser could require payment of more than he actually paid; and it is laid down in Gilb. Lex Præt. (*d*), that if a stranger purchase an incumbrance at an under-value, with notice of a subsequent incumbrance, the latter creditor might redeem him, paying the money that the former gave, because the latter was entitled to redemption before the other interfered; but if the first incumbrancer had offered it to the second mortgagee at the same price at which the stranger purchased it, and he had refused the offer, the case had been different, and a quære is added, whether, if the second incumbrancer had notice of the whole money lent by the first mortgagee at the

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(*a*) Phillips *v.* Vaughan, 1 Vern. 336; Williams *v.* Springfield, *ibid.* 476; Baker *v.* Kellett, 3 Ch. Rep. 23; Anon. 1 Salk. 155.

(*b*) Phillips *v.* Vaughan, *supra.*

(*c*) Williams *v.* Springfield, *supra.* (*d*) Pages 282, 283.

time he advanced his money, the purchaser might not have required the full debt.

In another case (*e*), it is stated to have been determined by the Court that an heir or *any other*, should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he actually paid for the same, without regard to what was really due on such incumbrance.

It is, however, now clear that a *creditor* purchasing in a subsequent incumbrance for less than its value, shall be entitled as against intermediate incumbrancers, or others, to recover the full amount of the debt (*f*); but it is doubted whether the same doctrine applies to a *stranger* (*g*). In the anonymous case in Salkeld, however, it is stated, that "if one acts for himself, and being not in the circumstances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due on the mortgage, for he stands in the place of him that assigned, viz. the mortgagee, who might have given it to him *gratis*, and what is due must be the measure of our allowance, and not what he gave, for that might have been more than it is worth, as well as less, and since he runs the hazard if loss happens, he ought to have the benefit in case it turns to advantage; so said and admitted, per

(*e*) Long *v.* Clopton, 1 Vern. 464.

(*f*) Morret *v.* Paske, 2 Atk. 54; Darcy *v.* Hall, 1 Vern. 49; *et vide* Bromley *v.* Holland, 5 Ves. 620, note.

(*g*) *Vide* Powell, 396; Patch on Mortgages, 278, 279, *et quære.*

Cowper, Lord Chancellor." These remarks apply as much to a stranger as to a creditor.

In Morret *v.* Paske (*h*), Lord Hardwicke says, "an agent, trustee, heir at law, or executor, purchasing a puisne incumbrance, shall as against another incumbrancer, be paid no more than what he gave for this incumbrance, otherwise as to a prior creditor, who *bonâ fide* buys in the puisne incumbrance, though he did not give the full value for it." "The rule," he adds, "is laid down generally indeed by Lord Chancellor Jefferys, in the case of Williams *v.* Springfield (*i*), as well with regard to creditor and creditor, as to trustees, heir at law, or executor, but I cannot say that I remember any decree in this Court, subsequent to that case, where it has been laid down as a general rule, but has been much more narrowed since, and holds only, as I observed before, with regard to agent, trustees, heir at law, or executor(*k*)." Now although Lord Hardwicke's remark applies especially to the case of a creditor purchasing in an incumbrance, yet it will be observed, that the doctrine of Chancellor Jefferys applied as well to the case of the stranger, as of the creditor, and Lord Hardwicke's disapprobation of his law is expressed in general terms; and it is suggested that the point is open to discussion, whether the doctrine of Chancellor Jefferys must not be confined to the instances

(*h*) 2 Atk. 53; *et vide* Bromley *v.* Holland, 5 Ves. 630, note.

(*i*) *Vide supra.*

(*k*) *Et vide* Braithwaite *v.* Braithwaite, 1 Vern. 335; and Anon. 2 Vent. 353.

put by Lord Hardwicke, viz. of agents, trustees, heirs at law, and executors, excepting that it will, it seems, apply to the case of a *guardian* buying in an incumbrance charged on the estate of the infant for less than its value, of which the infant will have the advantage (*l*).

A distinction must be taken if the heir at law or trustee, &c., has himself a charge on the estate; in which case he will have the full benefit of an incumbrance bought in for his protection (*m*).

(*l*) Powell *v.* Glover, 3 P. Wms. 251, note.
(*m*) Darcy *v.* Hall, 1 Vern. 49.

CHAPTER IV.

OF DEVISES AND BEQUESTS OF MORTGAGES.

EVERY mortgagee, so long as the land is redeemable, has a two-fold interest in the property in mortgage, viz. a beneficial interest, which in the eye of equity is personal estate, and a legal interest, which is either real or personal according to the nature of the mortgage; and in considering the will of a mortgagee, the questions which may arise are, whether he has intended to pass both, or one, or neither of these interests, to the parties claiming under the will. If he has not intended to pass either of these interests, then the beneficial interest has devolved on his executor, as part of his personal estate, and (if the mortgage be in fee) the legal interest has devolved on his heir at law, in trust for the executor (*a*); but if the mortgage be for a term of years, then both the legal and beneficial interests have devolved on the executor. If he has passed the beneficial interest only, and the mortgage be in fee, then the legal interest has devolved on the heir at law, in trust for the legatee (*b*). If he has passed the legal interest only, then the devisee has become a trustee for the executor. If he has contrived to pass the beneficial interest to *A.* and the legal interest to *B.*, then *B.*

(*a*) For an instance of this *vide Ex parte* Morgan, 10 Ves. 101.

(*b*) *Vide* Attorney-General *v.* Meyrick, 2 Ves. 46.

has become a trustee for *A.* (*c*), and lastly, he may have given both the beneficial and legal interests to the same person.

The decisions on some of these points have been, and still continue to be, various and very contradictory. The effect of the words "mortgages" and "securities for money" in the will of a mortgagee in fee, has been *vexata quæstio.* It is clear that either will pass the whole interest of the devisor in equity; but a doubt has existed whether they will at law pass the fee-simple of the *lands.* An early case, decided in the Common Pleas (*d*), has generally been considered as directly in point, that under the words "all my mortgages," the *lands* will pass. But in a note of Chief Baron Parker annexed to the case, it is said that the mortgage was not *forfeited* at the time of making the will; by which is to be understood, it is presumed, that it was more especially considered as coming within the meaning of the word "mortgage." And it now appears, from the judgment of the Court of King's Bench in the case of Galliers *v.* Moss (*e*), that on reference to the record of the special case in Crips *v.* Grysil, it was discovered that the will contained words going greatly beyond those stated in Croke, the words of the will being,— "In the name of God, Amen. I, Peter Key, at this present, blessed be God, whole both in bodye and mynde and of perfect memorye, doe make this my last will and testament in manner and form as followeth: the rest of my goods not before bequeathed, my mo-

(*c*) *Vide* 1 Atk. 605, note. (*d*) Crips *v.* Grysil, Cro. Car. 37.
(*e*) 9 Barn. & Cress. 278.

ney, bills or bonds, mortgages or specialties for money, I doe give unto Robert Key, my sonne, and doe make him my sole executor, *yea and alsoe my heire of this freehoulde.*" The special verdict does not state that he had any other property than the land in mortgage, of which he could make Robert Key his heir, and it must be granted the case is not of that weight which has generally been attached to it, independent of the remarks of Chief Baron Parker. In a subsequent case, decided in the King's Bench within ten years after the first decision (*f*), in which the mortgage *was* forfeited, the Court came to a decision that the lands did not pass under the word "mortgages." But the Court agreed (*g*) that if the testator had devised "all his estate in such land," or had mentioned that he had such land mortgaged in fee, and had devised "his mortgage," the fee would have passed. It therefore would appear that the Court of King's Bench considered the word "mortgage" in a will, strong enough to pass the fee-simple, if the testator's intention to that effect could be ascertained. In the case of the Attorney-General *v.* Meyrick (*h*) the Master of the Rolls appears to have taken for granted, that the word "mortgages" would *not* pass the legal interest in the lands. He says, "by a gift of all one's mortgages to *A.* the whole *beneficial* right passes to him, and be the legal interest either in the heir or executor, each will be considered a trustee

(*f*) Wilkinson *v.* Merryland, Cro. Car. 447, 449. The words were, "all the rest of my goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof I am possessed, I devise to my wife, after my debts and legacies are paid."

(*g*) Cro. Car. 450. (*h*) 2 Ves. 47.

for him (*i*). And in the case of the Attorney-General *v.* Munday (*k*), it was not contended that by a bequest of the *mortgage debt*, the lands in mortgage passed. And yet in a recent case (*l*) Sir William Grant is reported to have said, there was no doubt *a gift of the money* would carry the mortgagee's interest in the land on which it was secured. The case indeed turned upon a different point, and consequently does not amount to an authority, but still the opinion of so great a lawyer is deserving the highest consideration; the facts were, that a mortgagee in fee of estates in Lancashire, had obtained a decree of foreclosure, and afterwards made his will, by which he gave "the interest or proceeds of certain farms in the county of Lancaster mortgaged to him for 2500*l.*," to his wife for life, and after her decease he gave "one-third part of the sum of 2500*l.* principal money disposed of in mortgage of farms aforesaid," to his daughter Harriot, and one-third to his daughter Elizabeth, and one-third to his son William. The bill was filed, insisting that by the terms of the will, the estates in Lancashire were to be considered as part of the testator's personal estate: the Court held that if the will was duly executed, the land passed by it; and the Master of the Rolls put the case hypothetically, "if it had been a mortgage, there was no doubt a gift of the money would have passed the land."

In Silvester *v.* Jarman (*m*), the words of devise

(*i*) But it is submitted that the word "*mortgage*" will pass a mortgage term, or other chattel interest.

(*k*) 3 Ves. jun. 348.

(*l*) Silberschildt *v.* Schiott, 3 Ves. & Bea. 49. (*m*) 10 Price.

were amply sufficient *per se*, to have carried the legal fee, but other words being introduced, subjecting the property devised to the payment of debts, it was held that the land did not pass. The words of devise were: "I give to *J. B.*, and his heirs, all the rest and residue of my freehold, leasehold, and copyhold estates of which I may be seised at the time of my decease, either in possession or reversion, together with all my goods, chattels, monies, bonds, mortgages, and debts which may be owing to me at the time of my decease, subject to the payment of my debts, legacies, annuities, and funeral expenses."

In Renvoize *v.* Cooper(*n*), a testator, after devising his freehold estate to his wife in fee, upon trust to sell, bequeathed to her all the rest and residue of his estates, book debts, bills, bonds, mortgages, *and other securities for money*, funded property and effects whatsoever, and of what nature and kind soever; Sir John Leach, Vice Chancellor, decided that the mortgaged fee passed to the wife under the words mortgages and other securities for money, though coupled with personal property.

In Galliers *v.* Moss (*o*), the testator gave all his real estates to trustees upon certain trusts. He then bequeathed various articles of personalty, ready money and *securities for money*, to the trustees, their executors and administrators. The Court of King's Bench held the legal fee in the mortgages did *not* pass. But in that case the Court placed some reliance on the gift

(*n*) 6 Maddox, 371. (*o*) 9 Barnewall & Cresswell, 267.

being to trustees, their *executors and administrators*, and Mr. Justice Bayley seemed to think that a bequest of mortgages, and the securities *for the same*, would carry the fee.

In the case of Mather *v.* Thomas (*p*), the Court of Common Pleas appear to have concurred in opinion with the Vice Chancellor in Renvoize *v.* Cooper, that under the words "securities for money," the legal estate in the mortgages *would* pass.

And in a yet more recent case (*q*), on a general gift of all the testator's real estate, ready money, *securities for money*, and other personal estate to trustees, their heirs, executors, administrators and assigns, upon trust to sell the real estate, and collect the personalty, Sir L. Shadwell, Vice Chancellor, decided, that the words "and other securities for money" would pass the legal fee, distinguishing the case from Galliers *v.* Moss, and observing that in the principal case the devise contained the word *heirs*, which Mr. Justice Bayley remarked to be wanting in Galliers *v.* Moss.

It is clear at the present day, that if a mortgagee in fee in possession of a forfeited mortgage, but the equity of redemption in which is not barred, make a general devise of "all his lands, tenements, and hereditaments, or of all his real estate," the devisee will not take a *beneficial* interest in the lands in mortgage, although under the modern cases he might take the *legal* estate. The case of Strode *v.* Russell (*r*) applies

(*p*) 10 Bingham, 43. (*q*) *Ex parte* Barber, 5 Simons, 454.
(*r*) 2 Vern. 625; *sed vide* 1 Atk. 605, note.

to this point. A testator being seised of very considerable real estate and of some mortgages in fee, made a general devise of all his lands, tenements and hereditaments out of settlement, provided the devisee took upon himself the name of Litton, and subject to raise 4000*l.* in case the testator left a daughter. It was contended, that the mortgage in fee passed, but the Court held unanimously, that *though forfeited,* the lands in mortgage did not pass by the general devise.

There is, however, no doubt that if a mortgagee in fee devise the mortgage premises by a particular description (*s*), or if he point to them by a locality which cannot be misunderstood, and which does not apply to any other part of his property, both the beficial and legal interests will pass (*t*); and in a modern case, in which a testator gave all his freehold, copyhold, and leasehold estates by a general description to trustees to found a college, it was held that some old mortgages, *one of which was in fee,* passed under the will to the trustees (*u*); but in order to support this decision, Lord Eldon ultimately *presumed* a release of the equity of redemption of the mortgage in fee, *prior* to the date of the will (*x*).

In modern times, the principal dispute has been,

(*s*) How *v.* Vigures, 1 Ch. Rep. 33; Noys *v.* Mordaunt, 2 Vernon, 581.

(*t*) Clarke *v.* Abbot, Barnard. Rep. 457; 2 Eq. Ca. Ab. 606, 41; Woodhouse *v.* Meredith, 1 Mer. 450; *et vide* Martin *v.* Mowlin, 2 Burr. 969, and Davis *v.* Gibbs, 3 P. Wms. 26.

(*u*) Attorney-General *v.* Bowyer, 3 Ves. 724, 725; 5 Ves. 303.

(*x*) Attorney-General *v.* Vigor, 8 Ves. 277.

not whether the beneficial interest, but whether the legal interest has passed so as to bring the devisee as a trustee within the statutes authorizing the conveyance of trust estates by infants (*y*); and these cases have in general proceeded on the principles regulating devises of trust estate: the question being, whether a general devise sufficient in terms to comprehend all the testator's real estate, would, of itself, pass the legal fee in lands of which the testator was seised as a mortgagee or trustee. On this point the law has undergone very considerable alterations.

In an early case (*z*), it is laid down that "if a man have lands in fee, and other lands mortgaged to him in fee, by a devise of 'all his lands,' the mortgage would pass; if a man have but the trust of a mortgage of lands in *D.*, and have other lands in *D.*, by a devise of all his lands in *D.* the trust would pass." In a subsequent case (*a*), a trustee devised as follows: "As to such estate as the Lord had bestowed upon him, he devised part to *I. S.*, and his heirs, and all the rest of his real estate he devised to his wife and her heirs." The Master of the Rolls said, "Though this be a trust estate, yet the legal estate being in the devisor, in the eye of the law, it is *his* estate and *his* property, and therefore passes by the devise of his estate; and if he had devised *all*

(*y*) *Supra*, page 431.

(*z*) Sir Thomas Littleton's case, 2 Vent. 351. *Vide* the same case under the name of Wynn *v.* Littleton, 1 Vern. 3; and see observations by Mr. Sanders in 1 Atk. 605, on this case, and on the case of Strode *v.* Russell, *supra*.

(*a*) Marlow *v.* Smith, 2 P. Wms. 198.

the lands which he had been seised of, these lands would certainly have passed."

The like doctrine was held in a case mentioned in an able note by Mr. Sanders, in his edition of Atkins (*a*), which, in fact, went far beyond the preceding cases, for in that case a mortgagee in fee of lands in Surrey, devised all his real estates in Sussex, Kent, and Middlesex, and elsewhere in England, in possession, reversion, or otherwise, to certain uses, under which Thomas Knight, an infant, was then tenant in tail. The mortgage-money was paid to the executor, but the legal estate had not been reconveyed. The question was, whether the legal estate was in the infant; and if so, whether he could convey by recovery pursuant to the statute. Lord Hardwicke decreed that the infant should convey the legal estate; and, it appearing under the devise in the will that Thomas Knight, the infant, was tenant in tail, with remainders over, it was ordered that all proper parties should concur in all necessary acts for the infant's suffering a common recovery, in order to make the conveyance effectual (*b*). Previously, however, to the case of *Ex parte* Bowes, occurred the case of Casborne *v.* Scarfe (*c*), in which Lord Hardwicke is reported to have said, that by a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass; unless (he adds) the equity of redemption be foreclosed; and if, after such devise made, a foreclosure is had, yet such estate shall not

(*a*) *Ex parte* Bowes, 1 Atk. 605, note.
(*b*) Reg. Lib. A, 1743, fol. 587. (*c*) 1 Atk. 605.

pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered *as a new purchase of the land.* Now it has been considered and was so stated by a late very eminent counsel (*d*), that Lord Hardwicke's opinion in Casborne *v.* Scarfe was clear, that a mortgage in fee not foreclosed would not pass by a general devise; to which Lord Eldon is reported to have replied, that he did not believe Lord Hardwicke said so, and he would look at his notes. The observation was made by counsel, in reference to the question of the legal interest passing by the general devise; and the answer of Lord Eldon is to be considered as confined to that point. Mr. Sanders, in his note to Atkins, before referred to, justly remarks, "that the question is, whether we must understand Lord Hardwicke's meaning to be, that the general devise of all lands, tenements, and hereditaments, will neither pass the legal nor beneficial estate of mortgages in fee after forfeiture; or whether those words are only incompetent to pass the beneficial interest. If the latter, he observes, the rule, generally speaking, is certainly right, because the beneficial interest being, in fact, nothing but the money due on the mortgage, and the lands mortgaged being considered in equity merely as a security for a personal debt, it is very evident that such personal or beneficial interest cannot pass by words peculiarly adapted to transfer real property, unless in some particular instances, as where the testator had no other lands than those mortgaged to him; in which case the manifest in-

(*d*) *Vide* 8 Ves. 436.

tention would hold against the general construction." Looking, however, at the context, and to the line of reasoning pursued by Lord Hardwicke in Casborne *v.* Scarfe, it is submitted, that it is manifest his Lordship was referring to the beneficial interest in the land, and was considering the matter in an equitable point of view only. The question before him was, whether a husband was entitled to an estate by curtesy in an equity of redemption; which led him naturally to consider what an equity of redemption was; and his object was to shew, that the person entitled to the equity was seised of an actual *estate* in the land, and not of a mere right, as had been argued for the defendant. In support of this doctrine, he makes the assertion alluded to, and then continues in these words: "The interest of the land must be somewhere, and cannot be in abeyance, *but it is not in the* mortgagee, and therefore must remain in the mortgagor; *A.* devises his estate, and after makes a mortgage in fee, though that is a total revocation in law, yet in this Court it is a revocation *pro tanto* only: it is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance, he certainly is, *till a foreclosure*." Now it is submitted that it is impossible Lord Hardwicke could have been considering the legal interest in these remarks, because he says the interest of the land is not in the mortgagee, and cannot be in abeyance, and therefore must be in the mortgagor, which clearly shews the view he was then taking of the case. His argument, in fact, appears to have been this: You say the husband is not entitled to be tenant by the cur-

tesy, because his wife had not *an estate* in the land, but it is clear she had *an estate* in the land, for it was not in the mortgagee as is demonstrated by the fact, that the mortgagee's interest would not pass by a devise in words referable to real estate, and therefore as the estate cannot be in abeyance, it must be in the mortgagor, and consequently your argument is without foundation. It is submitted that the judgment of Lord Hardwicke in *Ex parte* Bowes is not at variance with his opinion in Casborne *v.* Scarfe. It will be observed that in *Ex parte* Bowes, Lord Hardwicke discarded all reference to the *intention* of the testator, it being evident that he could not intend to put the legal estate into strict settlement, but his Lordship decided the case upon the strength of the general terms used by the testator.

The next case in point was heard before Sir Pepper Arden (*e*). A mortgagee in fee bequeathed the mortgage debt to his executors upon certain trusts, and devised all the residue of his estate and effects (subject to the payment of his debts, and to an annuity of 30*l.*) to his sister Elizabeth Watham, her heirs and assigns for ever. He died leaving his sister and his niece (an infant) his co-heirs. The Master reported his opinion to be, that the legal estate passed to the devisee, but if it did not, then he was of opinion the niece was a trustee of one moiety within the 7th Ann. In support of the Master's opinion, *Ex parte* Bowes was cited by Mr. Richards, with

(*e*) Duke of Leeds *v.* Munday, 3 Ves. 348.

whom was the Attorney-General. On the other side, the opinion of Lord Hardwicke in Casborne *v.* Scarfe was mentioned, and the Attorney-General admitting he could not support the devise, the Master of the Rolls is reported to have said he had no doubt about it, and ordered the infant to convey, and expressed his dissent from the case of *Ex parte* Bowes. In reference to this case, however, the Master of the Rolls afterwards took the opportunity of mentioning that the report was not correct, in stating he had no doubt about it (*f*), his idea was that the legal estate did not pass, and he made the order to prevent the party from being turned round on account of a doubt, but he took care to make it conditionally, declaring that the infant was a trustee and mortgagee within the act, and ordering her to convey, so far as any legal estate in the mortgaged premises descended to her.

The next case (*g*) was also heard before the Master of the Rolls on petition. A mortgagee in fee devised all the residue of his real and personal estate to his great nephew John Marten Cripps, his heirs, executors, and administrators, and appointed him sole executor. John Marten Cripps was an infant. The Master reported his opinion that the legal estate in the mortgage did not pass to the devisee, but descended on the testator's heir at law. The Master of the Rolls thought the Master wrong in his judgment, and was of opinion the infant was a trustee, but he could not order him to convey the estate, because,

(*f*) *Vide* 5 Ves. 341. (*g*) *Ex parte* Sergison, 4 Ves. 147.

as an executor, he was entitled to the money secured on the mortgage, and he could not permit an infant, though he was an executor, to receive the money (*h*). A petition was then presented to the Chancellor (Loughborough), who seemed inclined to think there was enough in the will to pass the mortgaged estate. It was urged at the bar, that all the late cases required *express* words to make the mortgaged estate pass by the will. The Lord Chancellor said, the best order he could make was to confirm the report, and order the money to be paid into the Bank in the name of the Accountant-General, *ex parte* the infant, and for the parties to take a conveyance from the heir at law, and also from the infant when he came of age, so the title would be good *quâcunque viâ datâ*.

The point in question was next brought under the consideration of a court of law in a case (*i*), in which a man having estates to which he was beneficially entitled in the counties of Wilts and Dorset, and a trust estate in the county of Southampton, devised all the residue of his estates in Wiltshire and Dorsetshire, and elsewhere in England *(after payment of debts, legacies, and funeral expenses,)* to his son William Reade, his heirs, executors, &c. The question was, whether the trust estate passed by the devise or descended to the testator's heir at law. Lord Kenyon said, the words were sufficiently comprehensive to pass the estate, if it could be collected from the

(*h*) As to this, *vide supra*, p. 426.

(*i*) Roe *v.* Reade, 8 Term Rep. 118.

will, that the devisor intended it should pass; but in the case of Strong *v.* Teat (*k*), it was determined that the general words in a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense. Now in this case, the trustee (the devisor) had no beneficial interest in the land in question, and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates "after payment of his debts, legacies, and funeral expenses." Now these latter governed and restrained the general effect of the former words, and shewed that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. In this opinion Mr. Justice Grose concurred, and a verdict was entered for the plaintiff. On this case, two important observations obviously present themselves; the first is, that courts of law will recognize a trust, and permit it to sway their decision; and the second is, that it was the opinion of the Court of King's Bench, that a dry legal estate would pass by a general description sufficient to comprize it, if there were not evidence of a contrary intention on the face of the will.

Within a few months after the case of Roe *v.* Reade, the question was agitated in equity, in a case in which the contrary doctrine was very broadly laid down (*l*). In that case the testator (a trustee) made a general devise of all his real estate, and

(*k*) 2 Burr. 912. (*l*) Attorney-General *v.* Buller, 5 Ves. 339.

all his right, property and interest therein at law or in equity, unto his second and third sons John and Francis, and their heirs. It was stated at the bar, the rule was, that the general words in a will would not pass trust estates, unless there appeared to be an intention that they should pass. The Lord Chancellor said, that was certainly the understanding at present; perhaps, the more convenient rule would have been the reverse, *as it might be more easy to find a devisee than an heir*. The Attorney-General suggested that the rule that a trust estate should pass by a general devise, would *not* be the most convenient from the frequent instances of estates tail being created by general words, in consequence of which the legal estate might get into an infant fettered by an entail. This case may be considered as going the full extent of the doctrine, that the legal estate would not pass by a general devise, unless an intention to that effect was shewn in the will; and at the same time as shifting the ground of argument from the evidence of intention to that of convenience, and raising the question whether it was more convenient that the legal estate should, generally speaking, pass under a general description to a residuary devisee, or descend on the heir at law; or, in other words, whether the probable inconvenience would be greater in the estate being hampered by an entail in an infant under the devise, or in being vested in persons who might be in foreign parts or labouring under other disabilities.

The next case was heard on petition, soon after the

elevation of Lord Eldon to the Seals (*m*). In this case the testator had made a general devise and bequest of all the residue of his estate and effects to his *natural son*, George Hall, his heirs, executors, administrators and assigns, *for his and their own proper use and behoof*, and appointed two other persons executors. Hall afterwards assumed the name of Brettel, and died intestate, leaving issue a son and daughter, both infants. The testator was, at the time of his death, possessed of a mortgage in fee, as a trustee for another. The Master reported his opinion, that the mortgaged estates had passed to Brettell, and were then vested in his infant son. The case of the Attorney-General *v.* Buller was cited as contradicting *Ex parte* Sergison. The Lord Chancellor is reported to have said, "that he rather agreed with what the Attorney-General said, in Attorney-General *v.* Buller, for besides an estate tail, you cannot tell how many contingent remainders and executory devises there may be, and it was a strong circumstance that the devisee was a natural child, and if he should die without children, and without a will, the legal estate might go to the Crown. This discussion," he added, "began with Sir Thomas Sewell, and his idea was, that the word 'my' would not refer to what was not beneficially his. In this will there are the words 'to and for his and their own proper use and behoof.' Probably the testator meant nothing by that, but a meaning must be attributed to every word." His Lordship rather thought there was not enough to make the infant a trustee; and dismissed the petition.

(*m*) *Ex parte* Brettell, 6 Ves. 577.

In a subsequent case (*n*), the whole of this doctrine was reheard and fully considered by Lord Eldon, and the matter placed on a sounder footing. A trust estate having descended on Sir Rowland Alston, as the son and heir of the surviving trustee of the will of Owen Thomas Bromsall, Sir Rowland by his will devised all his real estates whatsoever and wheresoever, unto his wife Dame Gertrude Alston, her heirs and asigns. The question was, whether the legal estate had passed to Lady Alston under the will, or had descended on the co-heirs of Sir Rowland, two of whom were infants, and another a feme covert; so that the degree of inconvenience proved in this case to be on the side of descent. The usual application had been made on petition, for a reference to the Master, to inquire, &c. The Master had reported the legal estate did not pass by the will, and that the infants were trustees within the act. The Master of the Rolls thought the legal estate did pass by the will, and dismissed the petition. After this the matter came on before the Lord Chancellor on exceptions taken to the Master's report; in behalf of the exceptions, the cases of Attorney-General *v.* Buller and *Ex parte* Brettell were cited; and for the plaintiffs, the cases of Marlow *v.* Smith and Roe *v.* Reade.

The Lord Chancellor, after premising that he gave an opinion with a great deal of hesitation and difficulty, and stating that the legal estate was either in Lady Alston, as devisee, or in two infants and a mar-

(*n*) Lord Braybroke *v.* Inskip, 2 Ves. jun. 417.

ried woman, and the case therefore raised the question whether the *quantum* of convenience was on one side or the other, said the question must be decided; for it was unseemly, because there were doubts in whom it was vested, to have the money paid into Court, and the infant to convey when of age, as had been done in other cases. His Lordship then proceeded to review all the modern cases. He remarked that in *Ex parte* Sergison, the infant being entitled to the money, the ground of Lord Alvanley's decision was, that he was not a dry naked trustee; and that case, therefore, was not a decision one way or the other. The case of the Duke of Leeds *v.* Munday, he remarked, must be attended to with due regard to what was stated in the note to the Attorney-General *v.* Buller. Besides, there was a circumstance in that case aiding much the decision as evidence of intention, *viz.* that the testator had charged all his (residuary) estates and effects, *with the payment of his debts and an annuity.* Lord Eldon next remarked on the case of the Attorney-General *v.* Buller, and on the contradictory assertions in that case, viz. that the trust estates should pass by the general devise, if there was not something upon the face of the will confining it, and the direct contrary as stated on the other side. In respect of which his Lordship observed "Where the latter position was collected I do not know; no authority was stated for it." He then adverted to the question of convenience and inconvenience, as between devisee and heir, and said, "Upon a limitation of real estates in strict settlement, a vast number of limitations over, contingent remainders, executory devises, powers of join-

turacy, leasing, raising sums of money, it was impossible to say the intention could be to give a dry trust estate; for the question attaches as much upon that as upon a mortgage. But if you take a simple case of a testator, having an heir at law, under circumstances in which you cannot get him to execute, abroad; or if the testator did not know him; or as in this instance, two infants and a feme covert, who must levy a fine, then the argument of convenience was all the other way, if the testator gives a mere dry trust estate to an individual competent to do the acts, and at hand to do them, as Lady Alston was." He next adverted to *Ex parte* Brettell, and explained that he did not mean to be understood to put any stress, as he had been understood by the Bar to have done, upon the expression that it was given to the use and behoof of the party. He agreed that giving to a man, his heirs and assigns, was perfectly the same. His meaning was only that it ought to be a circumstance upon the intention that the testator did not mean a mere dry trust estate. He next proceeded to say, that in the principal case he was disposed to concur with the Master of the Rolls, meaning rather to state his judgment that the rule was not, that in every case where general words are used, the property shall or shall not pass, but that in each case you must look at every part of the will for the intention with regard to such property. He did not know in experience any case in which the proposition was laid down so strong, one way or the other, as it was laid down in the Attorney-General *v.* Buller. He knew no case that states as the rule, that trust estates shall not pass under

general words, unless an intention that they should pass appeared; and he inclined to think they would pass, unless he could collect from expressions in the will, or purposes, or objects of the testator, that he did not mean they should pass. His Lordship added, "The result is this; a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as was unlikely for a testator to make of any property not in the strictest sense *his*, as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend; *I know of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects or the person of the devisee has been held not to pass the trust estate.*" He ultimately declared, that upon the best consideration he could give the point, his opinion was, that the trust estate *did pass*, and that he must overturn Roe *v.* Read, if he should say it did not.

Since the decision in Braybroke *v.* Inskip, the point appears settled, that if in a will there be a general devise in fee, sufficiently comprehensive to pass the legal interest to the devisee, who is a person *sui juris*, and competent to convey, and the will does not charge the devised estate with debts, legacies, or annuities, and there is not in the whole will, any other declared intention inconsistent with a devise of trust or mortgaged estates, then, although there is not in the will any declared intention of the testator to de-

vise the trust or mortgaged estates, they will pass to the devisee; and, in such a case, the concurrence of the heir at law may be dispensed with.

In *Ex parte* Morgan (*o*), this doctrine was again recognized. In that case, a mortgagee in fee devised all his real estates to his niece Ann Williams, her heirs and assigns, *charged with an annuity of* 20*l.*, and appointed her executrix. Lord Eldon decided the legal estate did not pass, by reason of the annuity, and, which, he observed, was not charged on the personal estate. In that case a further question arose on the will of the heir at law of the mortgagee, who had devised the real estates vested in him by way of mortgage, to trustees, upon trust to get in and receive the mortgage money; and the Court determined that this second devise did not comprehend the mortgaged lands, which had descended upon him as heir of the mortgagee.

If a mortgagee devise all his freehold, leasehold, and copyhold estates, and all his goods, chattels, monies, mortgages, and debts owing to him at the time of his decease, subject to the payment of debts, &c., the legal estate it seems will not pass to the devisee, although he is also executor (*p*).

Whether the legal estate will pass under a gift of securities for money has been already considered (*q*).

(*o*) 10 Ves. 101.

(*p*) Silvester *v.* Jarman, 10 Price, 78; *et vide Ex parte* Whitaker, Sand. on Uses, 359, 4th edit.

(*q*) *Supra.*

It has now become a general practice with conveyancers to *except* the testator's mortgaged and trust estates out of a general devise in his will, and to insert an express devise of these estates to trustees, with a declaration that the money secured upon the mortgages shall be considered as part of his personal estate.

If a mortgagee obtain an absolute decree of foreclosure, or a release of the equity of redemption, or even become absolutely entitled by length of possession, as before explained, *prior* to the date of his will, a general devise of all his lands, tenements, and hereditaments, although in strict settlement, will, it is conceived, unless he manifest an express intention to the contrary, pass the mortgaged lands both at law and in equity; but if at the time of the will he be not so absolutely entitled, then it is conceived that a *subsequent* foreclosure, or release (unless the will be republished) will not confer on the devisee the beneficial estate, *because a foreclosure is considered as a new purchase of the land* (*s*). The consequence will be, that if the legal interest in mortgaged lands shall by a general description, have passed at law to the devisee, and the mortgagee shall afterwards obtain a release or foreclosure of the equity of redemption, or shall become absolutely entitled by lapse of time, and shall die without a republication of his will, the devisee will become a trustee for the tes-

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(*s*) *Vide* Casborne v. Scarfe, 1 Atk. 606; Strode v. Russel, 2 Vern. 625.

tator's heir at law, even although the devisee be also the executor or residuary legatee. The author would have considered this a clear point; but he observes that the author of a modern publication (*t*) appears to have arrived at a different conclusion, and cites as an authority the case of Attorney-General *v.* Bowyer (*u*).

In that case it appeared that Sir George Downing, being seised of large real estates and of a mortgage in fee executed in the year 1694, by his will in 1717, devised all his real estates to Sir Jacob Downing, (who was his heir at law) for his life, with various remainders over, all of which failed, with remainder to trustees in fee to found a college, and he gave all his personal estate to Sir Jacob, and appointed him executor. The testator died in the year 1749; Sir Jacob died in 1764, having given all his real and personal estate to his widow absolutely. One question raised was, whether this old mortgage passed to the trustees for the college. Lady Downing, in her answer, stated she did not believe there was any release of the equity of redemption. Lord Loughborough said, that considering the length of time, he had no difficulty in holding, that the lands constituted part of the testator's estate and passed by his will. The cause again came on to be heard before the same judge for further directions, and it was contended that in 1717 the mortgage passed as personal estate to Sir Jacob, and from him to Lady Downing. Lord Loughborough admitted, that at the date of the

(*t*) Patch on Mortgages, 140.

(*u*) 3 Ves. 714, 724, 725; 5 Ves. 300, 303; 8 Ves. 277.

will it was money, but said, that by a release of the equity of redemption, it would go to the devisee; and if the testator lived the period when all the equity of redemption was gone, then it existed no more as part of his (personal) property, but as land, and he (Lord Loughborough) would never take it up again as money; "there is no equity," he added, "between the heir and executor, or the devisee and executor." The report afterwards states that his Lordship said, "the mortgagee's title to it as land was antecedent to the will, and his Lordship could not tell the point of time at which it became land; he could find no other date at which the title accrued to the mortgagee, but the date of the conveyance which was antecedent to the will." Now, this latter part of the judgment is apparently at variance with the first part, in which his Lordship is made to admit that it was money and not land at the date of the will. Besides, it is remarkable that his Lordship only puts the case as between the heir or devisee and executor, and not between the devisee and the heir at law. The point was reheard before Lord Eldon, who surmounted the whole difficulty *by presuming a release of the equity of redemption prior to the date of the will.* It is therefore submitted that the law remains as laid down in Casborne *v.* Scarfe, and Strode *v.* Russel. In a recent case (*x*), it was held that lands in mortgage would not pass under a general devise of real estate in strict settlement, in a will executed subsequently to a decree to account, but prior to the final order for foreclosure.

(*x*) Thompson *v.* Grant, 4 Madd. 438.

In another case (*y*), in which a will made subsequently to an order for foreclosure *nisi*, contained a specific devise of the mortgaged lands, but the devisor died before an account taken, or an order obtained for absolute foreclosure, it was held that as between the devisor and devisee, the mortgaged estate should be considered as realty, but should be personal estate for the benefit of creditors. This decision, it will be observed, does not in the least interfere with the case of Thompson *v.* Grant, or the doctrine in Casborne *v.* Scarfe, and Strode *v.* Russel (*z*).

A bequest of the money secured on mortgage will pass the estate if then foreclosed, and will not open the foreclosure (*a*).

A bequest of money secured on mortgage is within the Mortmain Act, 9 Geo. II. (*b*).

A bequest of the principal of a mortgage debt will not pass the arrears of interest (*c*), and a bequest of the arrears of a mortgage will carry the interest only (*d*).

(*y*) Garret *v.* Evers, Mosel. 364.

(*z*) *Et vide* Jarman on Devises, vol. 2, p. 155.

(*a*) Le Gros *v.* Cockerell, 6 Sim. 384; Silberschilt *v.* Schiott, *supra*.

(*b*) Attorney-General *v.* Meyrick, 2 Ves. 44.

(*c*) Roberts *v.* Kyffin, Barn. 259; 2 Atk. 112.

(*d*) Hamilton *v.* Lloyd, 2 Ves. jun. 416.

MISCELLANEOUS CHAPTER.

In the 59th Geo. III. was passed an act for establishing a registry of colonial slaves in Great Britain, and it was enacted that after the first day of January, 1820, no deed or instrument made or executed within the United Kingdom, whereby any slave or slaves in any of the said colonies should be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any *estate or interest therein* created or raised, should be good or valid in law to pass or convey, charge or affect any such slave or slaves, *unless the registered name and description, or names and descriptions of such slave or slaves should be duly set forth in such deed or instrument, or in some schedule thereupon indorsed, or thereto annexed, according to the then latest registration, or corrected registration, of such slave or slaves in the office of the registrar of slaves.*

By an act passed in the 3 & 4 Will. IV., cap. 73, slavery was abolished throughout the British colonies, and the sum not exceeding twenty millions was voted by parliament as a compensation to the owners of the slaves or persons interested in them. The provisions therefore of the 59 of Geo. III. have become obsolete and useless.

In reference to the appointment of a receiver by a Court of Equity, on application by the mortgagee, the rules appear to be that if the mortgagee, *having the legal estate*, neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he cannot obtain such appointment by order of the Court, but must proceed to eject the mortgagor (*a*); if the first mortgagee be in possession, the Court will not, in general, on the application of a subsequent mortgagee, appoint a receiver (*b*), but the second mortgagee must redeem the first; and a charge of mismanagement and collusion is not sufficient ground on motion before answer, to take the possession from him (*c*); and in order to deprive a mortgagee of the possession, on the ground of mismanagement, the charge must be of a clear and specified nature (*d*). But if the first mortgagee be not in possession, a second mortgagee may have a receiver, without prejudice to the rights of the first (*e*), although the mortgagor has not appeared to the suit and is out of the jurisdiction (*f*).

When a receiver has been appointed by the Court,

(*a*) Berney *v.* Sewell, 1 Jac. & Walk. 647.

(*b*) Berney *v.* Sewell, *supra*; *et vide* Codrington *v.* Parker, 16 Ves. 469; Quarrell *v.* Beckford, 13 Ves. 377.

(*c*) Berney *v.* Sewell, *supra.*

(*d*) Rowe *v.* Wood, 2 Jac. & Walk. 553.

(*e*) Berney *v.* Sewell, *supra;* Bryan *v.* Cormick, 1 Cox, 422; Dalmer *v.* Dashwood, 2 Cox, 378, *et vide* Phipps *v.* Bishop of Bath and Wells, 2 Dick. 608; Price *v.* Williams, Cooper, C. C. 31; Archdeacon *v.* Bowes, 3 Anstr. 752.

(*f*) Tanfield *v.* Irvine, 2 Russell, 159.

it would be contempt in the first mortgagee to proceed in ejectment, without the consent of the Court (*f*); and upon his application for such purpose the course has been either to permit him to bring ejectment, or to be examined *pro interesse suo* (*g*).

An examination *pro interesse suo* proceeds by interrogatories, and a reference to the Master to report, if the claimant has made good his title, and the report is set down for directions, and a final order made (*h*). It is not regular to take *exceptions* to the report (*i*). The order will be made as well against a receiver as sequestrators (*k*), and the effect of such an examination may in general be obtained on motion or petition (*l*).

After the master's report has been confirmed, a reference to him may be obtained to calculate principal and interest and costs, and the rents in the receiver's hands are to be applied, first, in payment of costs, and then in reduction of the mortgage, and possession will be given up (*m*).

(*f*) Brooks *v.* Greathed, 1 Jac. & Walk. 178; Angel *v.* Smith, 9 Ves. 335; Anon. 6 Ves. 287; Bryan *v.* Cormick, *supra*.

(*g*) *Vide* 1 Jac. & Walk. 178; 9 Ves. 338.

(*h*) Hunt *v.* Priest, 2 Dick. 540.

(*i*) Hamlyn *v.* Lee, 1 Dick. 94.

(*k*) Gomme *v.* West, 2 Dick. 472.

(*l*) Walker *v.* Bell, 2 Madd. 21; Dixon *v.* Smith, 1 Swans. 457; Dickenson *v.* Smith, 4 Madd. 177; *Et vide* 1 Jac. & Walk. 179. n.

(*m*) Walker *v.* Bell, *supra*.

A receiver appointed by the Court should enter into a recognizance with two sureties (*n*), and the tenants are ordered to attorn, and pay their rents to him (*o*). If it is intended that his duty should exceed keeping down the interest, the order should specify it (*p*).

A receiver appointed on behalf of several mortgagees cannot be discharged without the consent of all (*q*).

A bond by the mortgagor for performance of the covenants and conditions in the mortgage-deed, would be forfeited by a breach of the *proviso* in the deed for payment of the money (*r*). It was formerly a general practice to give a bond for the debt and interest, which, if bearing even date with the mortgage, is exempted from the duty (*s*). But since the passing of the 1 Will. IV. cap. 47, the precaution of taking a bond by way of additional security has become less important (*t*).

A sum secured on mortgage of real estate may be the subject of a *donatio mortis causâ*, and the real and

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(*n*) Mead *v.* Lord Orrery, 3 Atk. 244.

(*o*) Rowley *v.* Ridley, 2 Dick. 630.

(*p*) Gresley *v.* Adderley, 1 Swanst. 573.

(*q*) Largan *v.* Bower, 1 Sch. & Lef. 296.

(*r*) Tooms *v.* Chandler, 2 Lev. 116; 3 Keb. 387: *contra* Briscoe *v.* King, Cro. Jac. 281; Yelv. 206.

(*s*) *Vide* 55 Geo. III. cap. 184.

(*t*) *Et vide supra*, Chap. FRAUDULENT DEVISES.

personal representatives of the mortgagee will be trustees for the donee (*u*).

If tenant for life, with a power to consent to a sale by the trustees of the settlement, executes a conveyance of his life estate by way of mortgage, the power is not destroyed, and may be exercised either by the mortgagee reconveying to the mortgagor, or joining in the conveyance to the purchaser (*x*).

The depositary of a lease, by way of equitable mortgage, will be held liable in equity to the rent and covenant, although he has not taken possession (*y*).

If an estate is devised subject to debts and legacies, a mortgagee advancing money to the devisee, although also the executor, is liable to the charge, if the circumstances of the case afford intrinsic evidence that the mortgage money is not to be applied in payment of debts and legacies (*z*).

And if in the case of a similar devise, a mortgage is made by the devisee expressly subject to the *legacies*, and on the money being called in by the mortgagee, a transfer is made to a third party with a confirmation by the mortgagor, to whom a further

(*u*) Duffield *v.* Elwes, 1 Bligh, N. S. 498.

(*x*) Walmesley *v.* Butterworth, App.

(*y*) Flight *v.* Bensley, 7 Sim. 149.

(*z*) Watkins *v.* Cheek, 2 S. & S. 199; Johnson *v.* Kennett, 6 Sim. 384.

advance is made, but the transfer is not expressed to be made subject to legacies, the party advancing the money being falsely informed of their being satisfied, yet he will take subject to the legacies, as by the conveyance he has gained the same estate as was held by the first mortgagee (*a*).

If estates are devised charged with specific sums to the executors for payment of debts, a mortgagee is bound to see to the application of the mortgage money, notwithstanding releases have been executed to the devisees by the executors, but which did not shew the charges to have been raised or paid (*b*).

The petition in *Ex parte* Stanley having been re-heard (*c*) by the Vice Chancellor, and the case of *Ex parte* Whitton (*d*) being referred to, his Honor made the order in conformity with the opinion of the Master of the Rolls in *Ex parte* Whitton (*e*).

(*a*) Rogers *v.* Rogers, 6 Sim. 364.
(*b*) Braithwaite *v.* Britain, 1 Keen, 206.
(*c*) 7 Sim. 170. (*d*) *Supra.* (*e*) *Supra.*

APPENDIX.

Master of the Rolls. 17th November, 1834.

PEACOCK *v.* BURT (*a*).

Mortgage—Tacking—Notice.

A second mortgagee cannot, by giving notice to the first, prevent a third mortgagee from obtaining a priority over his security, if the latter advance his money without notice of the second mortgage, and afterwards obtains the legal estate by buying up the first mortgage.

The third mortgagee being a purchaser for valuable consideration, is not bound by the notice to the first mortgagee.

ATKINSON, in March, 1810, executed a mortgage in fee to one Cade; further advances were afterwards made, and by indenture of the 14th of May, 1814, the mortgage was transferred to, and the estate became vested in fee in John Burcham, subject to redemption on payment of £7,800, and interest.

By indenture of 3d and 4th December, 1815, after reciting the mortgage to Burcham, Atkinson conveyed the same property to Thomasine Smith in fee, subject to redemption on transferring to Mrs. Smith the sum of £2,100 Navy Five per cent. Annuities.

It appeared that soon after the execution of this mortgage, Mrs. Smith wrote, and sent to Mr. Burcham, the first mortgagee, the following letter:—

(*a*) This and two following important cases have been furnished the author by the kindness of Charles Beavan, Esq. of the Chancery Bar, who has permitted the author to use his name in pledge of their accuracy.

" Mr. Burcham. " *Lincoln, December*, 1815.

" Sir, I understand you have a mortgage on the estate of " M. Atkinson, of Fulbeck, for £6,000, and it being necessary " that you should be informed I have just got from him a " second mortgage for £2000, which was left to me by my " late husband, Samuel Wood, if my writing to you, Sir, is " not sufficient, I shall esteem it a favour if you will inform " me."

Burcham afterwards advanced the further sum of £900 to Atkinson, and which, by an indenture of the 13th of February, 1816, he charged on the same property. Atkinson, the mortgagor, subsequently persuaded the plaintiff, Peacock, to advance the sum of £12,000 on the security of the property, on having a transfer of Burcham's mortgage; and accordingly, by indenture of the 12th and 13th May, 1817, and made between Burcham, Atkinson, and Peacock, in consideration of £8,700, paid by Peacock to Burcham, and of the further sum of £3,300, paid by Peacock to Atkinson, the premises were conveyed to Peacock in fee, subject to redemption on payment of the sum of £12,000, and interest; and afterwards, in 1823, Atkinson charges the property with the further sums of £1000 and £800 to Peacock.

On a reference to the Master it appeared that the estate was insufficient to pay all these incumbrances, and a question was then raised, whether Peacock was entitled to a priority to the whole extent of his security, over the mortgage to Mrs. Smith, or whether his priority was limited to the sum of £7812, the amount due at the time Mrs. Smith gave notice of her security to Burcham.

Peacock insisted that he, having no notice of Mrs. Smith's mortgage at the time he advanced his money, and possessing the legal estate and the title deeds, was entitled to a priority for the whole of his advances over Mrs. Smith's security, and the Master reported in his favour.

To this report Mrs. Smith took exceptions.

Mr. *Bickersteth* and Mr. *Wakefield* for Mrs. Smith. The

first mortgagee was, in respect of the equity of redemption, a mere trustee for the mortgagor, and those claiming under him, and all interests subsequently created by the mortgagor are mere equities. It is now clearly settled, that as between persons having equitable interests, he who first gives notice to the trustee gains a priority, Dearle *v.* Hall (*b*), Loveridge *v.* Cooper (*c*). Sir Thomas Plumer there lays it down, that where a contract respecting property in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is vested, then, by giving notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him.

It is clearly proved by the depositions of Mr. John Burcham that he received notice from Mrs. Smith of the mortgage, and being a mere trustee of the equity of redemption, his conscience became bound by that notice, and he was from that time a trustee for Mrs. Smith, and could not by any subsequent act of his own alter the equities between the parties.

Mrs. Smith has been guilty of no negligence or laches; she has done all that a party in the situation of second mortgagee could do; she cautioned Burcham against any act which might prejudice her right, and, as the plaintiff claims through Burcham, he must, therefore, be subject to the same equities as Burcham himself.

Pemberton and *Bethel*, for Peacock. We admit that Burcham had notice of the mortgage to Mrs. Smith, but that does not in any degree affect the rights of Peacock, for he had no notice; and a purchaser for valuable consideration can protect himself against every claim, if he has but the legal estate. Under the circumstances, he is entitled to defend himself either at law or in equity, against the defendant, who is a mortgagee, and a purchaser *pro tanto*. To hold that a mortgagee is a trustee of the equity of redemption, would be to overrule all the law laid down on the subject. It was the very ground of the decision in Cholmondeley *v.* Clinton, that he

(*b*) *Supra.* (*c*) *Supra.*

pending a suit, a third mortgagee can buy up the first, and obtain a priority over the second; Marsh *v.* Lee, 2 Ventr. 337; Brace *v.* Duchess of Marlborough, 2 P. Wms. 491; Belchier *v.* Butler, 1 Eden, 523; Belchier *v.* Renborth, 5 B. P. C. 292. It is clear that these cases furnish a decisive answer to Lord Eldon's question, and, in fact, to give a third mortgagee who has obtained a legal estate, a priority over the second, nothing further is necessary but that he had advanced his money without notice of the second mortgage, and this priority may be obtained even during the pendency of a suit; the equities of the two parties being equal, this Court, on that account refuses to interfere, not because he has better, but because he had an equal right. It appears that Mr. Powell, in the second volume of his Treatise on Mortgage, states the same objection, and he cites Whalley *v.* Whalley and Pomfret *v.* Lord Windsor; but it will be found, on reference to these cases, that they have no application to the point, and that they do not even contain the facts which would raise the question, and this fact removes the weight of the objection.

Upon these authorities, independently of other considerations, the third mortgagee, who is to all intents and purposes a purchaser for valuable consideration, being without notice, is entitled to the full benefit of his legal rights and remedies. It has been supposed that the cases of Dearle *v.* Hall, Loveridge *v.* Cooper, and Foster *v.* Blackstone, determine the point, but in my opinion, the decision in these cases proceeded on different principles; they merely decided, that as between parties having equities only, he who first gives notice obtains a priority, and this is apparent when we look at the grounds on which these cases were decided. Sir Thomas Plumer proceeded on the principle, that it was not possible to transfer the legal interest; that wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a Court of Equity considers "tantamount to possession, namely, notice given to the legal depositary of the fund." The question here is, says his Honor, "not which assignment is first in date, but whe-

The settlement contained the following power of sale or exchange:—Provided always, and it is hereby agreed and declared between and by the parties hereto, that it shall be lawful for the said John Entwistle and Thomas Wood (the trustees of the settlement), and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times hereafter, at the request, and by the direction of the said J. Walmesly, and plaintiff G. Walmesly, during their joint lives, and after the decease of such of them as should die first, at the request and by the direction of the survivor of them, testified by some writing, to dispose of, either by way of absolute sale, or in exchange for other hereditaments, to be situate in England or Wales, all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments, to any person or persons whomsoever, for such price or prices in money, or for such other equivalent in lands or hereditaments, as to the said J. Entwistle and T. Wood, or the survivor, or the executors, administrators, or assigns, of such survivor, shall seem reasonable and proper, and that for the purpose of effecting any such sale or exchange as aforesaid, it shall be lawful for the said J. Entwistle and T. Wood, and the survivor of them, and the executors, administrators and assigns of such survivor, at such request, and by such direction as aforesaid, testified as aforesaid, by any deed or instrument in writing, to be by them or him sealed and delivered, in the presence of, and attested by two or more credible witnesses, absolutely to revoke and make void all or any of the uses, trusts, powers, and provisoes hereinbefore limited and declared of the said hereditaments, and to appoint any uses, estates, or trusts of the said hereditaments."

By indentures of lease and release of the 30th and 31st of January 1833, the plaintiff George Walmesly conveyed his life estate to John Philpotts, by way of mortgage, subject to redemption on payment of 8,500*l.* on the 31st of July, 1833.

In March, 1834, the plaintiff entered into a contract with the defendant for the sale of part of the property for 6,500*l.*

The defendant was a willing purchaser, but a difficulty arose whether the power of consenting to the sale, given to the plaintiff by the marriage settlement, was so annexed to his life-estate as to have been destroyed by the conveyance of that estate of the mortgagee; and this bill was filed to have a judicial opinion on the point. The bill stated, "that the plaintiff had offered to procure the mortgagee, J. Philpotts, to join and concur in conveying the farms and hereditaments to the defendant, or to reconvey the same to the plaintiff, that in either way a good and perfect conveyance might be made to the defendant and his heirs." The answer admitted this offer, and the suit, which was for a specific performance, was brought to a hearing on bill and answer.

Mr. *Pemberton* and Mr. *Dalzell*, for the plaintiff, contended, that the tenant for life could still exercise his power of consenting to the sale, first, because his power was not inseparably annexed to his estate, Long *v.* Rankin (*a*); and secondly, because an interest still remained which preserved the power—Tyrrel *v.* Marsh (*b*). The tenant for life had still his equity of redemption, which was the whole estate—Cosborne *v.* Scarfe (*c*). and was acknowledged by courts of law (*d*) and by the legislature (*e*). They urged, that no intention appeared on these instruments of destroying the powers, and argued, that in all cases where the powers had been held to be extinguished, the rights of third parties were prejudiced, as in Noel *v.* Henley (*f*), Vincent *v.* Ennys (*g*). In those cases, the interest of the mortgagees would have been prejudiced by the exercise of the power; but, in the present case, it was not intended to act in derogation of the estate or rights of the mortgagee; that the case of the King *v.* Bulkeley (*h*) was a direct decision in favour of the power.

Mr. *Richards* contrà.

(*a*) Sugden on Powers, App. No. 5.
(*b*) 3 Bing. 31; *S. C.* 3 Law I. Rep. C. P. 138.
(*c*) 1 Atk. 603.
(*d*) 3 Term. Rep. 771.
(*e*) 4 & 5 Will. III. c. 16.
(*f*) 1 M'Cl. & Y. 303.
(*g*) 3 Vin. Abr. 432.
(*h*) Doug. 292.

MASTER OF THE ROLLS (*i*). — In this case, it appears, upon the plaintiff's marriage, certain lands were conveyed to the use of trustees, for a term, to secure an annuity; subject thereto, to the intent that an annuity might be paid to the plaintiff during the joint lives of himself and his father, and for a term of 100 years to secure that annuity; and subject thereto for the term of 500 years to secure younger children's portions, with remainder to plaintiff's father for life, with remainder to the plaintiff for life, with remainder to trustees to preserve contingent remainders, and then to secure an annuity to the intended wife of the marriage, with remainder to the first and other sons in tail; and in this settlement there was a power of sale, upon which the question arises. That power of sale was—(*reads the power*). It appears that John, the first tenant for life, died, and that Thomas Wood, one of the trustees, died; and in the month of January, 1833, the plaintiff, being then tenant for life in possession under the settlement, conveyed, in the usual manner, his life estate to J. Philpotts, by way of mortgage, subject to the usual clause of redemption; and in the month of March, 1834, the plaintiff entered into a contract with the defendant for the absolute sale of the lands in question. The title tendered to the defendant depended upon the power of sale and exchange in the settlement. The bill alleges that the plaintiff had offered to procure Philpotts to join in the conveyance, or to reconvey to the plaintiff; and the answer admits that such an offer had been made, and submits two questions to the Court: — first, whether the power of sale and exchange exists so as to enable the vendor to make a good title under the power; and, secondly, whether the mortgagee can, in the way proposed, remedy the defect. The former is, I conceive, the only point on which the opinion of the Court is required; but the pleadings seem scarcely to raise that question. The cause coming on upon bill and answer, and the issue between the parties being whether the plaintiff can make a good title to the de-

(*i*) Lord Cottenham.

that estate in the identical person to whom it is given." If in that case the power was not so far annexed to the estate as to prevent the tenant for life from executing it, after he had, for the purpose of securing the annuity, parted with his life estate, it is impossible to contend that it was so annexed in the present case; and if the intention of the parties is to prevail, it would be a lamentable sacrifice of such intention to technical rules and reasoning, to hold that a tenant for life had parted with the power given to him by the settlor by merely mortgaging his life estate, which is not, in the ordinary affairs of mankind, considered as parting with the estate itself. The case of Long *v.* Rankin has established a principle so much consistent with the intention of the parties, rather than the technical reasoning with which it is supposed to be inconsistent, that I feel no reluctance in following such a principle, and in applying it to the present case. The case of Tyrrel *v.* Marsh proceeds upon the same principle, though the point was not in terms adverted to. I am therefore of opinion, on both grounds, that the plaintiff is able to make a good title to the purchaser.

NOTE.—The learned author of the treatise on Powers entertained the following opinion on this case:—"That as the powers were not in this case inseparably annexed to the estates, Mr. Walmesly, the mortgagor, might still exercise his powers of sale and exchange, and appointment of trustees; but that if the mortgagee would reconvey to Mr. Walmesly, the mortgagor, the powers might, with much less objection, be exercised. That, in his opinion, a good title might be made in either way; but as this opinion was formed on modern decisions, which had somewhat altered the law as it formerly stood, but had not expressly decided the present point to its full extent, the purchaser was entitled, if he insisted on it, to have his title fortified by a decree."

Master of the Rolls.—December 24th, 1835.

RAMSBOTTOM *v* WALLIS.

Mortgage—Redemption—Foreclosure—Construction of Covenant.

A. mortgaged some property to *B.*; he subsequently mortgaged it to *C.*, who *covenanted* not to bring any suit, &c., within ten years, for obtaining possession or foreclosing. Held, that by this covenant *C.* was precluded from redeeming *B.* within the ten years.

The only relief to which a second mortgagee is entitled is, to a decree for the redemption of *the first mortgagee*, and for the foreclosure or redemption of the mortgagor. He has no right to compel the first mortgagee to transfer to him his first mortgage on payment of what is due, or to call on the mortgagee to join in such transfer.

There cannot be an adverse redemption between mortgagees in the absence of the mortgagor; if, therefore, by contract or other circumstances, a second mortgagee is precluded from bringing, or is unable to bring the mortgagor before the Court, a suit by such second mortgagee to redeem the first cannot proceed.

IN this case a party had mortgaged some property in the first instance to the defendant Wallis, and it was stipulated that the mortgage should not be redeemable until the 4th of September, 1833. Subsequently, by an indenture of the 7th of December, 1827, he mortgaged the same, with other property, to the plaintiff Ramsbottom, and by that indenture, which recited the mortgage to Wallis, the plaintiff agreed "that in case the mortgagor should pay the interest upon the mortgage-money half-yearly, then the plaintiff would not call in one moiety of the principal sum until the end of ten years, to be computed from the 25th day of December, 1826; nor would

call in the remaining moiety of the said principal sum until the day of the decease of the survivor of *A. B.* and *M. T.* (two persons therein named); nor bring, commence, or prosecute any action or suit, or other proceeding at law, or in equity, either for obtaining possession of the said hereditaments and premises, or for foreclosing the equity of redemption thereof, until the expiration of the said term of ten years, and the decease of the survivor of them the said *A. B.* and *M. T.*, as aforesaid." The deed then contained a provision to take effect in case default should be made in payment of the interest, but to which it is unnecessary further to advert.

By another indenture the mortgagor agreed, that if he should redeem the first mortgage he would hand over the title-deeds to the plaintiff, and that he would not join the defendant in any assignment of the first mortgage, without giving the plaintiff the option of paying off the money.

In September, 1833, when the first mortgage became redeemable, the plaintiff, in order to obtain the legal estate and possession of the title-deeds, applied to the defendant, Wallis, the first mortgagee, to transfer the first mortgage, offering to pay him what was due thereon. Wallis, however, declined transferring his mortgage, and this bill was filed in 1833, by Ramsbottom, the second mortgagee, against the mortgagor, and Wallis, the first mortgagee, praying "that an account might be taken of what was due to Wallis upon his security, and that upon payment thereof by the plaintiff to the defendant, he might be decreed to convey, surrender and assign the mortgaged premises to the plaintiff, his heirs and assigns, or as he should direct, and deliver up to the plaintiff all the title-deeds relating to the said premises; and that the mortgagor might be decreed to join in such conveyance and assignment; and that in case the mortgagor should pay off the said mortgage, he might be decreed to convey the legal estate in the said premises to the plaintiff, or as the plaintiff should direct, and deliver up to him the title-deeds; and in case it should appear, that in consequence of any agreement the said mortgage to Wallis was not then liable to be redeemed or

then obtain possession and file a bill to foreclose on his first mortgage; this would be contrary to the letter and spirit of the covenant in his mortgage deed, whereby he agrees "not to prosecute any suit for obtaining possession or foreclosure." We have strictly performed all we contracted for, yet the plaintiff seeks to place himself and us in a situation very different from that which he contracted for. Wallis is not desirous of obtaining either possession or foreclosure, yet the plaintiff may require both.

The authorities are directly opposed to this proceeding. In Fell *v.* Brown (*b*) Lord Thurlow says, "The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. I never remember a case where the decree has not been so perfected. This case was followed by Sir William Grant, in Palk *v.* Clinton (*c*), and by the present Vice-Chancellor, in Farmer *v.* Curtis (*d*). In Jones *v.* Biou (*e*) Lord Eldon says, "On the argument of the former order I was of opinion, that unless other parties were brought before the Court, the plaintiffs had not a right to redeem; it appeared to me that the defendant, as mortgagee, was in this situation, that she might refuse to convey the mortgaged premises to any one who was to become by that conveyance mortgagee or assignee of the mortgagee, (because no mortgagee can be compelled to place another person in his stead as mortgagee,) and might retain possession and refuse to reconvey, unless the persons entitled came to demand possession and reconveyance."

Though repeatedly asked, the Court has uniformly refused to interfere between two mortgagees in the absence of the mortgagor. If Wallis had been in possession, the decree would be that he should give up possession to the plaintiff; Seton on Decrees, 140. 146. This is a mere attempt of the plaintiff to evade his covenant.

Mr. *Tinney* and Mr. *Bethell* for Wallis.—If the first mort-

(*b*) 2 Bro. C. C. 278.
(*c*) 12 Ves. 48.
(*d*) 2 Sim. 466.
(*e*) 3 Swanst. 241.

issue execution until a certain time mentioned. Now the first question is, whether, independently of the technical difficulties which are in the way, the plaintiff has or not by the contract precluded himself from doing that which he is here attempting to do. It is clear, in the first place, that he covenanted not to commence proceedings to obtain possession of the estate or foreclose the equity of redemption till a future time, but he has reserved to himself that which is very important in the consideration of what the parties really meant; he has reserved to himself the right, if interest be not paid (an event which has not taken place), to call in the money, and to institute any action, suit, or other proceeding in respect thereof. Now, if he has reserved to himself the liberty of instituting any proceeding in respect of this money, in the event of interest not being paid, it is not a very strained inference to collect the meaning of the party to be, that if the interest were paid, he was not to institute any proceeding in respect of the money so secured to him. Now, it is quite clear, if he has no such right, he cannot be permitted to do indirectly, that which he has contracted in terms he would not do; he has in terms covenanted not to institute any proceeding to get possession of the estate, though the object of the bill, in fact, is to possess himself of the legal estate. He has covenanted not to institute any proceedings to foreclose the equity of redemption, but the result of this suit may be to operate as a foreclosure, as far as the mortgage of Wallis is concerned; he has instituted this suit, not for the purpose of compelling the mortgagor to redeem him, but to redeem another mortgage prior to his own. Now, it is obvious, that in the progress of this suit, if permitted to go on, the ordinary decree of redemption will be made against Wallis, and it is quite clear, that if it does not end in payment, then it will operate as a foreclosure of Wallis's mortgage. Wallis, in default of payment of the money, would have a right to say, "You have brought me here for the purpose of redeeming me—the time has gone by—your power of redemption is past—and I, therefore, am now entitled to have the mortgage

considered as foreclosed." If, on the other hand, Ramsbottom he should redeem the first mortgage, could he then, by virtue of that mortgage, proceed against the mortgagor, in defiance of the contract entered into by the mortgage deed? Could he deal with the first mortgage as a security, independent and standing upon different terms from that which he has himself taken, and in respect of which he has entered into the particular stipulations which I have mentioned? I think he is, in fact, doing that which is not only contrary to the spirit of the contract which he has entered into, but that which may, by the natural consequence of his proceeding in such a course, come directly in contradiction with the terms he has imposed upon himself.

But independently of this, there seem to be technical difficulties which would at once prevent him from further proceeding in this suit. He does not pretend he has a right to compel the mortgagor to redeem; he does not ask it; and if so, has he a right to bring the mortgagor before the Court for the purpose for which he has brought him before the Court? He prays nothing against him, except that he may join in the assignment; but as between him and the mortgagor, he can have no right to make him join in the assignment; he has, in fact, contracted not to institute any proceeding in respect of his mortgage-money, until a future time, but supposing he had not so contracted, what right has the mortgagee to ask the mortgagor to join in an assignment of a prior mortgage? He may, if he were so situated, redeem the first mortgage, and foreclose on that first mortgage, but he has no right to compel the mortgagor to join in the assignment and conveyance of the first incumbrance. Then he says, "You are interested in the account;" but a party against whom you can pray no relief, and who has no personal interest in the subject-matter of the suit, is not to be brought before the Court to stand by, that he may be bound by the account to be taken between two other persons. That is the only ground, independent of joining in the assignment, for bringing him here, because all that is alleged is, that he

ought to be here, merely for the purpose of seeing the account taken, in order that hereafter, when the plaintiff comes to settle his accounts with the mortgagor, he may have the opportunity of saying, "You were present at the settlement of the account between me and Wallis, and you are therefore bound by the result of the account so taken;" but if there can be no such decree against the mortgagor, and if, according to the contract, the ordinary relief against the mortgagor cannot be obtained at this time; if he is improperly brought before the Court, merely for the purpose of being present to see the account taken, and if there is no right to compel him to join in the assignment of the mortgage, of course the result must be, that as against the mortgagor the bill would be dismissed; but if it is dismissed against the mortgagor, can it proceed against Mr. Wallis, the mortgagee? Can Ramsbottom in a suit to which he has improperly made the mortgagor a party, and in which the mortgagor is not to be considered present, proceed to redeem the first mortgage? The authorities on this subject are quite conclusive: The cases of Fell *v.* Brown, Palk *v.* Lord Clinton, and Farmer *v.* Curtis, are quite conclusive that there cannot be an adverse redemption between the first and second mortgagees, without bringing the mortgagor before the Court. The second mortgagee has a right to do this; he has a right to put in operation his security; he has a right to work out the means of payment; but there being a prior incumbrancer before himself, he cannot do that against the mortgagor without putting that prior incumbrancer out of the way, the only means of doing which is, by redeeming. He is only permitted, therefore, to redeem the mortgage for the purpose of working out his security. It is very true that Lord Eldon gave to a second incumbrancer against the first, a remedy undoubtedly beyond what prior cases would authorize—he put a receiver upon the estate in the absence of the mortgagor, adversely against the first incumbrancer (*f*). It is not very easy to see how that could be done, except for the pur-

(*f*) His Honor probably alluded to the case of Tanfield *v.* Irvine, 2 Russ. 149.

pose of ultimately working out the security, and be the means of securing it in the mean time. There have been instances where the assistance of the Court has been offered to the parties, though in the absence of the mortgagor; but there the first and second mortgagees concurred, and the first mortgagee was willing to be redeemed; but it is, in fact, only doing that which the parties might do for themselves. The first mortgagee may convey to the second mortgagee, but he cannot compel the mortgagor to join. Where the first incumbrancer says "I will not be brought before the Court for the purpose of giving my title to you, unless you put yourself in that situation in which alone you are entitled to place yourself by a suit for the purpose of working out your security, and as the means of ultimately getting a foreclosure against the owner of the equity of redemption." The authorities to which I have referred, are very conclusive on that point. If, in the ordinary course, the second incumbrancer can only, by bringing the mortgagor before the Court, work out his remedy, and if the plaintiff has precluded himself from doing any thing against the mortgagor, has he not precluded himself from doing that which alone he is entitled to do for working out his security and foreclosing the equity of redemption?

In addition to the deed to which I have referred, there is another deed which has been insisted on in the argument, and which is important to be considered, viz. a deed by which the mortgagor covenanted with James Ramsbottom, with respect to the title-deeds belonging to the estate, which were in the possession of Mr. Wallis; and it is quite clear that the parties contemplated, not Ramsbottom, but the mortgagor redeeming the mortgage. I am, therefore, of opinion, both upon the contract the parties have entered into, and the technical difficulties which arise out of that contract, that the plaintiff has not any right to the relief which he asks by his bill, and therefore that the bill must be dismissed as against both, with costs.

Master of the Rolls, 5th December, 1836.

PERRY *v.* KEANE.

PERRY *v.* PARTRIDGE.

Mortgage—Foreclosure—Sale—Purchaser, pendente lite.

An equitable mortgagee by deposit is entitled, at his option, either to a foreclosure or sale.

A lease being granted by a mortgagor to a party without notice, nineteen days after a bill filed by an equitable mortgagee, set aside, being a purchase pendente lite.

THIS was a bill filed by the plaintiffs, who were equitable mortgagees by deposit, praying a sale *or* foreclosure of the mortgaged premises. It appeared that in the year 1832 Mr. James Keane being possessed of some leaseholds, assigned them to his two sons David and Daniel as tenants in common, in consideration of their paying certain debts of the father mentioned in the schedule, one of which was that due to the plaintiff. In 1833 the debt to the plaintiffs not having been paid, the title deeds of the property, with the assent of all parties, were deposited with the plaintiffs to secure the money; and by a memorandum dated the 3d of September 1833, and made between James Keane (the father) and his two sons David and Daniel of the one part, and the plaintiffs of the other part, it was agreed, that the plaintiffs should hold the deeds as a security for the payment of their debt, and in default of payment that Daniel and David Keane, and James Keane (if necessary), would execute a mortgage to the plaintiffs, such mortgage to contain a power of sale.

Default was made in payment of the debt, and this bill was filed, praying a sale or foreclosure, and that the defendants might execute a proper deed for vesting the property in the plaintiffs.

sum of 450*l.* due to the plaintiffs on a promissory note, deposited the leases with the plaintiff as a security, and who thereby became entitled to an equitable mortgage; default was made in payment of the money, and in consequence of this, the bill was filed on the 10th of December 1834. There can be no doubt but that the plaintiffs are entitled to have a mortgage executed to them. At the time this bill was filed, Partridge was in possession of part of the property as tenant from year to year, at a rent of 34*l.* On the 29th of December, which was nineteen days after this bill had been filed, Daniel, one of the persons to whom the leaseholds has been assigned, executed to Partridge a lease for sixty years in consideration of 200*l.*; and Partridge accepted this lease and paid 200*l.* without even asking to see the instrument under which Daniel was entitled, or making any inquiry. The bill had been filed at that time, and therefore there was a lis pendens, and there can be no doubt but that he was affected by it. He has no ground of complaint, for if he had made any inquiry he would have found that the deeds were in the possession of the plaintiffs. The lease was not discovered until some time after, and then the supplemental bill was filed. It is objected by David that he ought not to have been a party to the supplemental bill, but I do not see on what ground he should not be; the bill would have been defective without him. Though Partridge's lease must be set aside as against the plaintiffs, I still consider that he has a right to redeem them.

Mr. *Greene* again pressed for a sale of the property, but his Lordship held that the plaintiffs were entitled to have a foreclosure of the mortgage, which the defendants had agreed to execute to them.

POWER OF ATTORNEY IN EJECTMENT.

WHEREAS by indentures of lease and release bearing date respectively the day next before and even date with these presents the release being of three parts and made or expressed to be made between me the undersigned *R. A.* of *D.* in the county of *D.* esquire of the first part *S. H.* gentleman of the second part and *H. B.* esquire of the third part The messuage or tenement closes pieces or parcels of land and hereditaments therein particularly mentioned situate lying and being at *L.* in the county of *B.* have in consideration of the sum of 2000*l.* paid by the said *H. B.* to me the said *R. A.* been appointed released and conveyed by or by the direction of me the said *R. A.* to the use of the said *H. B.* his heirs and assigns for ever subject to a proviso or condition and covenant or agreement in the said indenture of release contained for the redemption of the said premises on payment by me the said *R. A.* my heirs executors or administrators unto the said *H. B.* his executors administrators or assigns of the sum of 2000*l.* on the day of next ensuing with interest for the same after the rate of 5*l.* *per cent. per annum* by equal half-yearly payments on the day of and the day of without any deduction or abatement whatsoever And whereas I the said *R. A.* have further agreed to secure the payment of the said sum of 2000*l.* and the interest for the same by my warrant of attorney with judgment to be entered up in pursuance thereof in his Majesty's Court of King's Bench at Westminster as of Hilary Term next or of some subsequent term in an action of trespass and ejectment against me the said *R. A.* at the suit of the said *H. B.* his heirs or assigns for recovery of the said premises Now therefore these are to desire and authorise you the attornies above named or any one of you or any other attorney of the Court of King's Bench aforesaid to appear for me the said *R. A.* in the said court as of Hilary Term

next or of any other subsequent term and then and there to receive a declaration for me the said *R. A.* in an action of trespass and ejectment of a farm at the suit of John Doe on the demise of the said *H. B.* his heirs or assigns for two messuages two curtilages six yards six barns six cowhouses six hovels four stables six gardens six orchards one hundred acres of land one hundred acres of pasture one hundred acres of arable land ninety acres of furze and heath and common of pasture for all manner of cattle with the appurtenances situate lying and being at *L.* and in the county of *B.* which the said *H. B.* his heirs or assigns on the day of had demised to the said John Doe for the term of fourteen years from the day of and thereupon to confess the same action or else to suffer judgment by *nil dicit* or otherwise to pass against me the said *R. A.* in the same action to be thereupon forthwith entered up against me the said *R. A.* of record in the said court for the recovery of the said term yet to come of and in the said tenements with the appurtenances and also for the recovery of 40*s.* damages besides costs of suit And I the said *R. A.* do hereby authorize you my said attornies or any one of you after the said judgment shall be entered up as aforesaid for me and in my name and as my act and deed to sign seal and execute a good and sufficient release in the law to the said *H. B.* his heirs executors administrators and assigns of all and all manner of error and errors writ and writs of error and all benefit and advantage thereof and all misprisions whatsoever had made committed done or suffered or to be had made committed done or suffered in or about touching or concerning the aforesaid judgment or in or about touching or concerning any writ warrant process declaration plea entry or other proceedings whatsoever of or in anywise concerning the same And for what you my said attornies or any of you shall do or cause to be done in the premises or any of them this shall be to you and every of you a sufficient warrant and authority And it is hereby declared that the judgment so to be entered up against the said *R. A.* as aforesaid is to be as and for a further security for the payment

MORTGAGE FOR A TERM OF YEARS.

THIS indenture made &c. between *A. B.* of the one part and *C. D.* of the other part witnesseth that in consideration of the sum of *l.* of lawful money of Great Britain by the said *C. D.* to the said *A. B.* at or immediately before the sealing and delivering of these presents in hand well and truly paid the receipt whereof he the said *A. B.* doth hereby acknowledge and of and from the same doth acquit release and discharge the said *C. D.* his heirs executors administrators and assigns for ever by these presents he the said *A. B.* hath granted bargained sold and demised and by these presents doth grant bargain sell and demise unto the said *C. D.* his executors administrators and assigns all &c. and all houses &c. and the reversion &c. and all the estate &c. to have and to hold the said messuage or tenement lands hereditaments and all and singular other the premises hereby granted and demised unto the said *C. D.* his executors administrators and assigns henceforth for and during the full end and term of one thousand years without impeachment of waste subject to the proviso or condition and covenant or agreement hereinafter contained for redemption of the premises Provided always and it is hereby agreed and declared between and by the said parties to these presents that if the said *A. B.* his heirs executors administrators or assigns do and shall on the day of which will be in the year well and truly pay or cause to be paid unto the said *C. D.* his executors administrators or assigns the sum of *l.* of lawful money of Great Britain and do and shall in the mean time well and truly pay or cause to be paid unto the said *C. D.* his executors administrators and assigns interest for the same after the rate of 5*l.* for every 100*l.* by the year from the day of the date of these presents by equal half-yearly payments on the day of and the day of without any deduction or abatement whatsoever then and in that case

and immediately after such payments shall be so made the said term of one thousand years shall absolutely cease and determine And the said *A. B.* doth hereby for himself his heirs executors administrators and assigns covenant promise and agree with and to the said *C. D.* his executors administrators and assigns that the said *A. B.* his heirs executors administrators or assigns shall and will well and truly pay or cause to be paid to the said *C. D.* his executors administrators or assigns the aforesaid sum of *l.* and the interest for the same after the rate at the days or times and in manner hereinbefore mentioned and appointed for payment of the same respectively And the said *A. B.* for himself his heirs executors administrators and assigns doth further covenant promise and agree with and to the said *C. D.* his executors administrators and assigns by these presents in manner following (that is to say) that he the said *A. B.* now hath in himself good right full power and lawful and absolute authority to grant and demise the hereditaments and premises hereby granted and demised or intended so to be with their appurtenances unto the said *C. D.* his executors administrators and assigns for the said term of one thousand years according to the true intent and meaning of these presents And that if default shall be made in payment of the said sum of *l.* or the interest for the same or any part thereof respectively contrary to the aforesaid proviso or condition and covenant or agreement for payment of the same it shall be lawful for the said *C. D.* his executors administrators and assigns at any time or times thereafter into and upon the hereditaments and premises hereby granted and demised or any part thereof to enter and the same peaceably and quietly to have hold occupy possess and enjoy and receive and take the rents issues and profits thereof to and for his and their own use and benefit for and during all the rest residue and remainder which shall be then to come and unexpired of the said term of one thousand years without any let suit trouble interruption or disturbance whatsoever of from or by the said *A. B.* his heirs executors administrators or assigns or any

other person or persons whomsoever and that free and clear and freely clearly and absolutely acquitted exonerated and discharged or otherwise by the said *A. B.* his heirs executors administrators or assigns well and sufficiently saved protected kept harmless and indemnified of from and against all and all manner of former and other gifts grants bargains sales jointures dowers mortgages uses wills entails annuities rent-charges rent-seck and arrears of rent fines issues amerciaments statutes recognizances judgments executions extents and all other titles troubles charges debts and incumbrances whatsoever And moreover that he the said *A. B.* and his heirs and all and every persons and person whosoever having or lawfully or equitably claiming or who shall or may have or lawfully or equitably claim any estate right title or interest in or to the said hereditaments and premises hereby granted and demised or intended so to be or any of them or any part thereof shall and will from time to time and at all times thereafter upon the request of the said *C. D.* his executors, administrators or assigns make do and execute or cause and procure to be made done and executed all and every such further and other lawful and reasonable acts deeds matters things conveyances and assurances in the law whatsoever for the further better more perfectly and absolutely conveying and assuring of the said hereditaments hereby granted and demised or intended so to be with their appurtenances unto the said *C. D.* his executors administrators and assigns for and during all the residue and remainder which shall be then to come and unexpired of the said term of 1000 years, or for conveying and assuring unto the said *C. D.* his heirs and assigns or unto such person or persons as the said *C. D.* his executors administrators or assigns shall in that behalf order and direct the freehold and inheritance in reversion immediately expectant on the expiration or sooner determination of the said term of 1000 years of and in the said hereditaments as by the said *C. D.* his executors administrators or assigns or his or their counsel in the law shall be reasonably devised or advised and required Provided al-

Proviso If mortgagor &c. shall pay &c. to *C. D.* then and in that case and immediately thereupon the said term of 1000 years hereinbefore limited to the said *C. D.* his executors administrators and assigns of and in the secondly herebefore limited moiety of and in the said manor &c. shall absolutely cease and determine And the said *C. D.* his heirs and assigns shall &c. convey the freehold and inheritance of and in the firstly hereinbefore limited moiety of and in the said manor &c. unto the said (mortgagor) his heirs and assigns or as he or they shall direct or appoint Covenant with *C. D.* to pay &c.

COVENANT TO RENEW.

And the said (mortgagor) for himself his heirs executors administrators and assigns doth covenant promise and agree with and to the said (mortgagee) his executors administrators and assigns by these presents in manner following (that is to say) That he the said (mortgagor) his executors administrators and assigns shall and will from time to time and at any time hereafter at his or their own proper costs and charges join and concur with the said (mortgagee) his executors administrators or assigns in all lawful and necessary acts deeds matters and things whatsoever whether the same be by surrender or otherwise for obtaining or procuring a renewal or renewals of the subsisting lease for the time being of the aforesaid premises unto the said (mortgagee) his executors administrators or assigns subject to the subsisting right title or equity of redemption of him the said (mortgagor) his executors administrators and assigns under or by virtue of these presents And that in case the said (mortgagor) his executors administrators or assigns shall after notice in writing to him or them given by the said (mortgagee) his executors administrators or assigns requiring the said (mortgagor) his executors administrators or assigns to

join or concur in any such acts deeds matters or things for the purpose aforesaid refuse decline or neglect to join and concur therein it shall be lawful for the said (mortgagee) his executors administrators or assigns at his or their sole discretion and of his or their sole authority by surrender assignment or other disposition of the then subsisting interest in the aforesaid premises or otherwise to obtain or procure a renewal or renewals from time to time of the subsisting lease of the said premises subject to such right title and equity of redemption as aforesaid And it is hereby agreed and declared that all the costs charges and expenses of the said (mortgagee) his executors administrators or assigns in or about the procuring or obtaining any such renewal or renewals as aforesaid shall be a charge on the aforesaid premises together with interest for the same after the rate of *5l. per cent. per annum* from the time or respective times of the payment of such costs charges and expenses respectively and the aforesaid premises shall not be redeemed or redeemable until payment by the said (mortgagor) his heirs executors administrators or assigns unto the said (mortgagee) his executors administrators or assigns of the amount of such costs charges and expenses and the interest for the same as well as the said sum of *l.* hereby intended to be secured and the interest for the same in manner aforesaid and according to the true intent and meaning of these presents.

GENERAL ORDER.

And I do further order, that upon application to the major part of the commissioners named in any commission of bankrupt by any person or persons claiming to be a mortgagee or mortgagees of any part of the bankrupt's estate or effects the said commissioners shall proceed to inquire whether such person or persons is or are a mortgagee or mortgagees

of any part of the bankrupt's estate or effects and for what consideration and under what circumstances and if the commissioners shall find such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate or effects and no sufficient objection shall appear to the title of such mortgagee or mortgagees to the sum claimed by him or them under such mortgage or mortgages that the commissioners do then proceed to take an account of the principal interest and costs due upon such mortgage or mortgages and of the rents and profits of the mortgaged premises received by such mortgagee or mortgagees or by any other person or persons by his their or any of their order or for his their or any of their use in case such mortgagee or mortgagees shall have been in possession of the mortgaged premises or of any part thereof and that the commissioners do then cause due notice to be given in the London Gazette and in such other of the public papers as they shall think fit when and where the said mortgaged premises are to be sold before them or by public auction at any other place or places if they shall so think fit and that such sale be made accordingly And I do further order that all proper parties do join in the conveyance or conveyances to the purchaser or purchasers as the said commissioners shall direct And I do further order that the monies to arise from such sale be applied in the first place in payment of the expenses attending such sale and then in payment and satisfaction of what shall be found due to such mortgagee or mortgagees for principal interest and costs and that the surplus of the said monies (if any) be paid to the assignees of the estate and effects of the said bankrupt but in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or mortgagees I do order that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency and to receive a dividend or dividends thereon out of the bankrupt's estate or effects rateably and in proportion with the rest of the creditors seeking relief under the said commission but so as not to disturb any

dividend or dividends then already made And for the better making such inquiry and taking such account as aforesaid and making a title to such purchaser or purchasers I do order that all parties be examined by the said commissioners upon interrogatories or otherwise as the commissioners shall think fit and do produce before the said commissioners upon oath all deeds papers and writings in their respective custody or power relating to the estate or effects of the said bankrupt or bankrupts as the commissioners shall direct.

LOUGHBOROUGH C.

MORTGAGE IN FEE FOR SECURING THE RE-TRANSFER OF 3000*l.* 3 PER CENT. REDUCED BANK ANNUITIES AND THE PAYMENT OF DIVIDENDS IN THE MEAN TIME.

THIS Indenture &c. between Thomas Brown of &c. gentleman of the one part and James Smith of &c. gentleman of the other part Whereas the said Thomas Brown having occasion for the loan of a sum of money the said James Smith at his request hath sold out 3000*l.* *3 per cent.* Reduced Bank Annuities lately standing in the name of the said James Smith in the books of the Governor and Company of the Bank of England and which after payment of the broker's commission and other incidental expenses of sale produced the sum of *l.* which the said James Smith hath paid into the hands of the said Thomas Brown as he doth hereby admit and acknowledge And whereas it was agreed at the time of the treaty for the said loan that the re-transfer of the said 3000*l.* *3 per cent.* Reduced Bank Annuities and the payment of dividends in the mean time should be secured as well by the bond and covenant of the said Thomas Brown as also by way of mortgage as hereinafter mentioned Now this indenture witnesseth that in pursuance of the said agreement on the part of the said Thomas Brown and in consideration of the said sum of *l.* of lawful money of Great

Britain the produce of the said 3000*l.* 3 *per cent.* Reduced Bank Annuities this day paid by the said James Smith to the said Thomas Brown as hereinbefore is mentioned the sale of which said 3000*l.* 3 *per cent.* Reduced Bank Annuities and receipt of the said sum of *l.* in manner aforesaid he the said Thomas Brown doth hereby admit and acknowledge and of and from the same and every part thereof doth acquit release and discharge the said James Smith his heirs executors administrators and assigns for ever by these presents He the said Thomas Brown hath granted bargained sold aliened released and confirmed and by these presents doth grant bargain sell alien release and confirm unto the said James Smith in his actual possession &c. all &c. and all houses &c. and the reversion &c. and all the estate &c. to have and to hold the messuages or tenements lands hereditaments and all and singular other the premises hereby granted and released or expressed and intended so to be with their appurtenances (free from all incumbrances whatsoever) unto and to the use of the said James Smith his heirs and assigns for ever but subject nevertheless to the proviso or condition and covenant or agreement hereinafter contained for redemption of the premises Provided always and it is hereby agreed and declared between and by the parties to these presents That if the said Thomas Brown his heirs executors or administrators do and shall on the thirteenth day of February which will be in the year or in case the books of the said Governor and Company of the Bank of England for the transfer of 3 *per cent.* Reduced Bank Annuities shall be then closed then do and shall on the first day after the said thirteenth day of February on which such books shall be open for making transfers of such stock well and truly transfer or cause to be transferred 3000*l.* 3 *per cent.* Reduced Bank Annuities in the said books of the said Governor and Company into the name or names of the said James Smith his executors administrators or assigns and do and shall in the mean time and from time to time well and truly pay or cause to be paid unto the said James

Smith his executors administrators or assigns such sum or sums of money as shall be equivalent to the dividends which would have become payable to him or them in respect of the said 3000*l.* 3 *per cent.* Reduced Bank Annuities in case the same had not been so sold out as aforesaid on or at the like days or times and in the like shares and proportions on or at and in which such dividends would have become payable in case such sale had not been so made as aforesaid without any deduction or abatement whatsoever out of the same or any part thereof respectively for or in respect of any taxes charges assessments payments or impositions whatsoever already taxed charged assessed or imposed or to be taxed charged assessed or imposed on the messuages or tenements and other hereditaments hereby granted and released or expressed and intended so to be or upon the said 3000*l.* 3 *per cent.* Reduced Bank Annuities so to be transferred as aforesaid or on the said sum or sums of money to be paid by way of dividends thereon or any part thereof respectively or upon the said James Smith his heirs executors administrators or assigns or any other person or persons for upon account or in respect of the said messuages or tenements lands and other hereditaments or of the said 3000*l.* 3 *per cent.* Reduced Bank Annuities or of the said sum or sums of money to be paid by way of dividends thereon or any part thereof respectively by authority of parliament or otherwise howsoever or for upon account or in respect of any other matter cause or thing whatsoever Then and in such case the said James Smith his heirs or assigns shall and will at any time after such transfer and payment shall be so respectively made as aforesaid upon the request and at the proper costs and charges of the said Thomas Brown his heirs executors administrators or assigns reconvey the said messuages or tenements lands and other hereditaments with their appurtenances unto the said Thomas Brown his heirs and assigns or as he or they shall in that behalf order or direct free from all incumbrances whatsoever made done or committed by the said James Smith his heirs executors administrators or assigns And the said

Thomas Brown doth hereby for himself his heirs executors and administrators covenant promise and agree with and to the said James Smith his executors administrators and assigns that he the said Thomas Brown his heirs executors administrators or assigns or some or one of them shall and will well and truly transfer or cause to be transferred into the name or names of the said James Smith his executors administrators or assigns the said last-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities in manner aforesaid and on or at the day or time hereinbefore mentioned and appointed for the transfer of the same and in the mean time well and truly pay or cause to be paid unto the said James Smith his executors administrators and assigns such a sum or sums of money by way of dividends in respect of the same 3000*l.* 3 *per cent.* Reduced Bank Annuities on or at such days or times and in such shares and proportions as is and are hereinbefore also mentioned and appointed for the payment of the same respectively (The usual covenants for title and for quiet enjoyment by the mortgagor until default) In witness &c.

Bond in the penal Sum of 6000*l.* for the re-transfer of 3000*l.* 3 *per cent.* Reduced Bank Annuities and the payment of Dividends in the mean time.

Thomas Brown of the parish of in the county of gentleman } Bond in the penal sum of 6000*l.*
To
James Smith of gentleman }

Whereas the above-bounden Thomas Brown having occasion for the loan of a sum of money the above-named James Smith at his request hath sold out 3000*l.* 3 *per cent.* Reduced Bank Annuities lately standing in his name in the books of the Governor and Company of the Bank of England and which after payment of the broker's commission and other incidental expenses of sale produced the sum of *l.* which the said James Smith hath paid into the hands of the said Thomas Brown and the re-transfer of which said 3000*l.* 3 *per cent.* Reduced Bank Annuities with payment in the

mean time of such a sum or sums of money as will be equivalent to the dividends which would have been payable in respect of the same in case such transfer had not been so made as aforesaid hath been in part secured to the said James Smith his executors administrators and assigns by certain indentures of lease and release and mortgage bearing date respectively the day next before and even date with these presents Now the condition of the above-written bond or obligation is that if the said Thomas Brown his heirs executors or administrators do and shall on the day of which will be in the year or in case the books of the Governor and Company of the Bank of England for the transfer of 3 *per cent.* Reduced Bank Annuities shall be then closed then do and shall on the first day after the said day of on which such books shall be open for making transfer of such stock well and truly transfer or cause to be transferred 3000*l.* 3 *per cent.* Reduced Bank Annuities in the said books of the said Governor and Company into the name or names of the said James Smith his executors administrators or assigns and do and shall in the mean time and from time to time well and truly pay or cause to be paid unto the said James Smith his executors administrators or assigns such a sum or sums of money as shall be equivalent to the dividends which would have become payable unto him or them in respect of the said first-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities in case the same had not been so transferred as aforesaid on or at the like days or times and in the like shares and proportions on or at and in which such dividends would have become payable in case such transfer had not been so made as aforesaid without any deduction or abatement whatsoever then and in such case the above-written bond or obligation shall be void or else shall remain and be in full force and virtue.

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London:—C. Roworth and Sons, Bell Yard, Temple Bar.